

## Exhibit AA

USDC, District of NJ  
C.A. No. 2:11-cv-01754-JLL-JAD

Williams, et al. v. BASF Catalysts, LLC, et al.  
Special Master Conference

Friday  
February 23, 2018

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY  
CIVIL ACTION NO. 2:11-cv-01754-JLL-JAD

KIMBERLEE WILLIAMS, et al.,  
Plaintiffs,

vs.

BASF CATALYSTS, LLC, et al.,  
Defendants.

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Friday, February 23, 2018  
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Stenographic Transcript of Special  
Master Conference, taken at the law offices of  
Ballard Spahr, 1735 Market Street, 48th Floor,  
Philadelphia, PA, before Robert J. Boccolini,  
Certified Court Reporter, on the above date,  
commencing at 10:05 a.m., there being present:

BALLARD SPAHR, LLP  
Woodland Falls Corporate Park  
210 Lake Drive East, Suite 200  
Cherry Hill, NJ 08002  
BY: ROBERTO RIVERA-SOTO, ESQ.  
SPECIAL MASTER  
WILLIAM P. REILEY, ESQ.

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## **1 APPEARANCES CONTINUED:**

3 COHEN, PLACITELLA & ROTH, PC  
Two Commerce Square, Suite 2900  
2001 Market Street  
4 Philadelphia, PA 19103  
BY: CHRISTOPHER M. PLACITELLA, ESQ.  
5 HARRY M. ROTH, ESQ.  
MICHAEL COREN, ESQ.  
6 ROBERT PRATTER, ESQ.  
JARED M. PLACITELLA, ESQ.  
7 ERIC S. PASTERNACK, ESQ.  
Attorneys for Plaintiffs

9                   KIRKLAND & ELLIS, LLP  
10                 655 Fifteenth Street, N.W.  
11                 Washington, D.C. 20005-5793  
12                 BY: PETER A. FARRELL, ESQ.  
13                 EUGENE F. ASSAF, P.C.  
14                 DANIEL A. BRESS, ESQ.  
15                 ELIZABETH DALMET, ESQ.  
16                 RONALD ANGUAS, ESQ.  
17  
18                 Attorneys for Defendant BASF Catalysts, LLC

15 PEPPER HAMILTON, LLC  
3000 Two Logan Square  
18th and Arch Streets  
16 Philadelphia, PA 19103  
17 BY: BARRY H. BOISE, ESQ.  
NINA M. GUSSACK, ESQ.  
ROBERT L. HICKOK, ESQ.

19 CAHILL, GORDON & REINDEL, LLP  
20 80 Pine Street, #17  
21 New York, NY 10005  
22 BY: THORN ROSENTHAL, ESQ.

SNEHA DESAI, ESQ.  
VINCENT J. MONTALTO, ESQ.  
MATTHEW LEPORE, ESQ.  
BASF Catalysts, LLC

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1       **TELEPHONIC PARTICIPANTS:**

2

ROBINSON MILLER, LLC  
One Newark Center, 19th Floor  
Newark, NJ 07102

4

**BY:** JUSTIN T. QUINN, ESQ.  
**Attorneys for Defendant BASF Catalysts, LLC**

5

6

HEROLD LAW  
25 Independence Boulevard  
Warren, NJ 07059  
**BY: ERIC TUNIS, ESQ.**  
**Attorneys for Defendant Thomas D. Halket**

9

10       MARINO, TORTORELLA & BOYLE, PC  
437 Southern Boulevard  
Chatham, NJ 07929  
**BY: JOHN A. BOYLE, ESQ.**  
**Attorneys for Defendant Arthur A. Dornbusch**

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1                           **SPECIAL MASTER:** Good morning, everyone.

2     Let me welcome you all to the home of the Superbowl  
3     champion Philadelphia Eagles. If anybody has  
4     something bad to say about them, don't.

5                           Let's get the appearances of counsel on  
6     the record, starting with the plaintiffs.

7                           **MR. PASTERNACK:** Eric Pasternack, Cohen,  
8     Placitella & Roth.

9                           **SPECIAL MASTER:** You're going to have to  
10    speak up. The room is a little --

11                          **MR. PASTERNACK:** Eric Pasternack, Cohen,  
12    Placitella & Roth.

13                          **MR. PLACITELLA:** Chris Placitella.

14                          **MR. JARED PLACITELLA:** Jared Placitella  
15    for plaintiffs.

16                          **MR. COREN:** Michael Coren for  
17    plaintiffs.

18                          **MR. ROTH:** Harry Roth.

19                          **MR. PRATTER:** Robert Pratter,  
20    P-R-A-T-T-E-R, for plaintiffs.

21                          **MR. ASSAF:** Gene Assaf for the  
22    defendant, BASF.

23                          **MR. BRESS:** Dan Bress for BASF.

24                          **MR. FARRELL:** Peter Farrell for BASF.

25                          **MS. DALMET:** Elizabeth Dalmet for BASF.

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1                   **MR. ANGUAS:** Ronald Anguas for BASF.

2                   **MR. LEPORE:** Matt Lepore, BASF.

3                   **MS. DESAI:** Sneha Desai, BASF.

4                   **MR. MONTALTO:** Vince Montalto, BASF.

5                   **MR. HICKOK:** Robert Hickok for Cahill.

6                   **MS. GUSSACK:** Nina Gussack for the  
7 Cahill defendants.

8                   **MR. BOISE:** Barry Boise for the Cahill  
9 defendants.

10                  **MR. ROSENTHAL:** Thorn Rosenthal from  
11 Cahill.

12                  **SPECIAL MASTER:** Okay. And also  
13 present is Will Reiley from our firm, as you already  
14 know is the one who keeps me organized. That is  
15 whenever Mr. Assaf allows him to do that, which  
16 segues into Mr. Assaf's letter of February 22nd --

17                  **MR. TUNIS:** I'm sorry, your Honor, there  
18 are also counsel on the phone. Eric Tunis on behalf  
19 of Tom Halket.

20                  **MR. BOYLE:** John Boyle from Marino,  
21 Tortorella & Boyle, on behalf of Arthur Dornbusch.

22                  **SPECIAL MASTER:** Anyone else?

23                  **MR. QUINN:** Jeffrey Quinn for BASF.

24 Good morning, your Honor.

25                  **SPECIAL MASTER:** Good morning. My

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1      apologies. I did not mean to forget you, but I did.

2                In any event, I assume everyone has seen  
3      Mr. Assaf's letter of yesterday where he lists the  
4      items that he thinks should be discussed, which are  
5      the four motions that are actually before me, and  
6      then he has a list of six other items that he thinks  
7      we should discuss.

8                I'm happy to do this in whatever order  
9      you want. But I had proposed doing the motions,  
10     leaving the crime fraud slash Kozlov motion for last  
11     and at that point address the items that are in Mr.  
12     Assaf's letter of yesterday, if that's okay with  
13     everybody, the idea being that by the end of doing  
14     all the motions, everybody's going to be so tired  
15     they'll be more agreeable about the last items in the  
16     letter. So if that's okay with everyone, why don't  
17     we do that.

18               Let us start with an easy one, which is  
19      plaintiffs' motion for leave to supplement the  
20      record.

21               On February 20th, 2018, under ECF number  
22      443, plaintiffs filed a motion for leave to  
23      supplement the record to add the April 16, 1983,  
24      deposition transcript of Peter N. Gale, G-A-L-E.  
25      They claim that the Gale deposition presents, one,

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1       that Mr. Gale was the third Engelhard scientist  
2       saying that Engelhard and Cahill knew of evidence  
3       that the Emtal talc contained asbestos fibers;  
4       second, that it shows that the evidence existed when  
5       the Ashton affidavit attested that Johnson mine ore  
6       did not contain asbestos; third, it proves that BASF  
7       and Cahill sought to erase all record of Gale's  
8       testimony; fourth, proves BASF and Cahill attempted  
9       to destroy or suppress evidence; and five, it proved  
10      that BASF and Cahill have not produced the documents  
11      identified in the Gale deposition.

12                   On February 21, 2018, under ECF number  
13      445, BASF filed its opposition. They first suggest  
14      that the motion to supplement the record is improper,  
15      that plaintiffs have had the Gale transcript for a  
16      long period of time, and also adds on for good  
17      measure that the reply brief that plaintiffs filed  
18      should be suppressed.

19                   Mr. Placitella, who is going to speak to  
20      this?

21                   **MR. PLACITELLA:** I will, your Honor.

22                   **SPECIAL MASTER:** Thank you.

23                   **MR. PLACITELLA:** In our original brief  
24      to the Court that was filed in November and then in  
25      our supplemental brief we had indicated that it was

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1 our understanding that the Gale deposition did not  
2 exist. And after filing our supplemental brief, we  
3 discovered in the production of Johnson & Johnson,  
4 which was made I think on November 17th, which is  
5 after our initial brief was filed --

6                   **SPECIAL MASTER:** But before your reply  
7 brief was filed.

8                   **MR. PLACITELLA:** But before the reply  
9 brief was filed, that the deposition was there.

10                  **SPECIAL MASTER:** Well, answer me this  
11 then. If you didn't have the Gale deposition in  
12 hand until 15 days after you filed your initial  
13 moving brief on the crime fraud exception, how do you  
14 account for the two separate references to the Gale  
15 deposition that appear in your brief?

16                  **MR. PLACITELLA:** Well, we believe that  
17 it was taken. We just didn't have the brief itself  
18 and --

19                  **SPECIAL MASTER:** I'm sorry, you didn't  
20 have the transcript.

21                  **MR. PLACITELLA:** The transcript itself.

22                  **SPECIAL MASTER:** Well then how do you  
23 make a representation as to what the transcript stood  
24 for, which you did twice again on pages 11 and 16 of  
25 your initial brief?

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1                   **MR. PLACITELLA:** Well, he was deposed on  
2 two separate occasions inside the Westfall case.  
3 Once he was deposed because he was listed as an  
4 expert and there was a squabble between the  
5 plaintiffs' lawyers and Engelhard, so he was deposed  
6 then. And then he was deposed a second time.

7                   We knew -- or we believed he was deposed  
8 based upon documents where he was copied on things.

9                   And if you look in the transcripts of  
10 Hemstock and Triglia, they talk about information  
11 that Mr. Gale had in his files. But we believed  
12 that deposition no longer existed.

13                  In fact, when I took Mr. Steinmetz's  
14 deposition in August, he in fact indicated that BASF  
15 did not have a copy of the transcript. He questioned  
16 whether the transcript was ever --

17                  **SPECIAL MASTER:** Ordered.

18                  **MR. PLACITELLA:** -- whether the  
19 deposition was ever even taken based upon the  
20 information he had. He actually said that.

21                  So frankly, we've been running pretty  
22 hard on this case trying to keep the schedule that  
23 the Court has allotted to us and that we've imposed  
24 on ourselves.

25                  There's hundreds of thousands of pages

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1 of production that were made on an ongoing basis. In  
2 the perfect world, we would have seen it on November  
3 17th. But it's not a perfect world. And we  
4 discovered it recently.

5 And frankly, we thought we had a duty of  
6 candor to the Court to tell you that we were wrong,  
7 because we were wrong. And we had made the  
8 allegation that the deposition no longer existed,  
9 when in fact it did exist.

10 It didn't exist in the files of BASF.  
11 It didn't exist in the files of Cahill. But it did  
12 exist in the files of Johnson & Johnson.

13 It's significant because in 1979, in the  
14 early part of the 1979, after getting a lot of  
15 information and lot of testing results, Engelhard  
16 decided to do a thorough assessment of its own mine.  
17 Mr. Gale traveled to the mine, along with Dr.  
18 Hemstock. Dr. Hemstock says that it was at his  
19 insistence that they did that. They wanted to  
20 characterize what was in the mine.

21 And what happened then was they went up  
22 and they took rock samples from two levels of the  
23 mine that they were currently exploring. There were  
24 multiple levels of the mine.

25 They then brought those rock samples

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1 back. Mr. Gale then went to Georgia Tech, actually  
2 used their equipment because it was very  
3 sophisticated, and he made notes, he drew  
4 conclusions, he determined that there was in fact  
5 asbestos in the mine.

6 That's significant for a number of  
7 reasons, which we'll spend some more time on in crime  
8 fraud.

9 But there were representations made by  
10 Engelhard through Mr. Ashton and others that there  
11 was no evidence of asbestos in the mine. Yet we had  
12 Mr. Gale, the geologist and the head scientist,  
13 finding asbestos in the mine.

14 It's significant because -- and we'll  
15 talk about it a little more later -- in Ashton's  
16 affidavit he cites to a deposition transcript from  
17 the Westfall case. That is the deposition  
18 transcript of their expert, Chidester.

19 So clearly Engelhard and Ashton were  
20 referring to stuff that went on inside the Westfall  
21 proceedings. They cited to Chidester's deposition  
22 and completely ignored or did not include depositions  
23 of their own scientists that came to opposite  
24 conclusions.

25 **SPECIAL MASTER:** So to -- I don't mean

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1 to short-circuit you, but I'm going to.

2 **MR. PLACITELLA:** Please.

3 **SPECIAL MASTER:** Your argument basically  
4 is the information is relevant and material.

5 **MR. PLACITELLA:** Yes.

6 **SPECIAL MASTER:** There are, if not  
7 necessarily exceptional circumstances, at least  
8 sufficient circumstances to justify the delay in  
9 presenting it as part of the application.

10 **MR. PLACITELLA:** Yes.

11 **SPECIAL MASTER:** And that it should be  
12 considered and given whatever weight is appropriate  
13 to it.

14 **MR. PLACITELLA:** That's absolutely  
15 correct. And Jared reminds me that we actually  
16 didn't locate it until after we filed the reply  
17 brief. Whether we should have seen it sooner, that's  
18 on us.

19 Now, I do want to address a couple of  
20 things as relates to this. BASF in their  
21 reply indicated that --

22 **SPECIAL MASTER:** You mean their  
23 opposition.

24 **MR. PLACITELLA:** Their opposition  
25 indicated that, well, it kind of proves that the --

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1 it goes against the plaintiffs' statements that  
2 spoliation and destruction of documents happened.

3 But actually, if you look at the  
4 transcript itself, it actually proves the point.

5 **SPECIAL MASTER:** You're now going to the  
6 weight of the evidence.

7 **MR. PLACITELLA:** I'm happy to stop  
8 there. I was just responding --

9 **SPECIAL MASTER:** I'm happy for you to  
10 stop there.

11 **MR. PLACITELLA:** Okay. And I won't  
12 respond to that unless Mr. Assaf addresses it.

13 **MR. FARRELL:** Thank you, your Honor.  
14 Peter Farrell for BASF.

15 **SPECIAL MASTER:** Good morning, Mr.  
16 Farrell.

17 **MR. FARRELL:** Good morning. So a  
18 couple of points in response. We obviously have no  
19 objection to the plaintiffs correcting the mistake in  
20 their brief. And we appreciate the fact that they  
21 brought their mistake to the Court's attention.

22 Our concern is with the effort to  
23 supplement reply materials which were themselves  
24 improper.

25 **SPECIAL MASTER:** Well, we're going to

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1 get to that later.

2                   **MR. FARRELL:** I understand that. But  
3 that was the real heart of our objection is that the  
4 reply itself was improper. And so an effort to  
5 supplement something that was improper is now into  
6 two layers of improper additions to the record in our  
7 view.

8                   **SPECIAL MASTER:** But isn't it fair to  
9 say, Mr. Farrell, that if they had had this  
10 information before they filed their crime fraud  
11 motion on November the 2nd of 2017, they would have  
12 included it? Certainly given the amount of paper I  
13 have in front of me, no one felt shy about adding  
14 exhibits to this record.

15                  **MR. FARRELL:** It's not a function of  
16 adding exhibits to the record. Plaintiffs used  
17 exhibits in their opening brief. Maybe they would  
18 have used it if they had known about it at the time.

19                  And BASF properly used exhibits in its  
20 opposition brief.

21                  **SPECIAL MASTER:** But I think you're  
22 conflating -- and maybe you need to. But I think  
23 you're conflating two different issues. One is the  
24 propriety of a motion for leave to supplement the  
25 record as opposed to your objection to the reply

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1 brief in and of itself in whatever format, whether  
2 supplemented or unsupplemented.

3 **MR. FARRELL:** I think that raises your  
4 Honor's point earlier about whether there's an  
5 explanation or excuse here that justifies the late  
6 notice of this transcript.

7 And on that score, I would note that the  
8 production from Johnson & Johnson still has not been  
9 produced to BASF by the plaintiffs. If it had been  
10 produced by the plaintiffs to BASF on I believe  
11 November 17th was the date Mr. Placitella cited, we  
12 would have cited the Gale deposition in our  
13 opposition brief.

14 And I'm not certainly not suggesting  
15 that anything intentionally was withheld or done  
16 improperly.

17 But the point is we're now hearing  
18 there's an explanation that justifies supplementation  
19 after the reply brief when we were denied the  
20 opportunity to address materials that the plaintiffs  
21 had weeks before our opposition brief was due.

22 I also obviously disagree with Mr.  
23 Placitella on the import of the document. And I  
24 don't want to get ahead of ourselves and start  
25 talking about the merits.

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1                   I would note that we did explain in our  
2 papers why we think that this deposition transcript  
3 certainly helps BASF in further proving that there  
4 was no improper spoliation. But I don't see how it  
5 carries any weight for the plaintiffs. And the one  
6 example we cited --

7                   **SPECIAL MASTER:** Well then why are you  
8 objecting to supplementing the record if you think it  
9 helps you and hurts them? I don't understand the  
10 logic of that.

11                  **MR. FARRELL:** The issue is the argument  
12 that is included in their supplementation papers and  
13 the fact that it is being packaged with the Appendix  
14 E and frankly the Appendix D that were included with  
15 plaintiffs' reply brief, both of which we thought  
16 were themselves improper. And that is really the  
17 heart of the objection that we have.

18                  **SPECIAL MASTER:** You're not alone in  
19 thinking that. But we'll get to that later.

20                  **MR. FARRELL:** Thank you, your Honor.

21                  **SPECIAL MASTER:** Anything else, Mr.  
22 Placitella?

23                  **MR. PLACITELLA:** No, your Honor.

24                  **SPECIAL MASTER:** I understand the  
25 procedural objections that BASF has propounded in

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1 respect of this application.

2                   However, as I've told counsel before, it  
3 seems to me that the determination of plaintiffs'  
4 crime fraud slash Kozlov exceptions motion is one  
5 that goes to the very core of this case, and that is  
6 going to be given a fair amount of attention. And  
7 anything that is out there that might be helpful to  
8 the determination of that motion is something I'm  
9 going to want to hear.

10                  So I'm going to grant the motion to  
11 supplement the record. But that's it. The record  
12 is now supplemented by it. You don't get to file  
13 another brief arguing what it says.

14                  And while we're on the topic of briefs,  
15 I want every lawyer in this room to remind me the  
16 next time that somebody asks for leave to file an  
17 over-length brief that it's denied presumptively.

18                  Having gone through all of these papers,  
19 and when my wife called last night at 11 o'clock  
20 wanting to know where I was, and I was still  
21 preparing for today, it doesn't help your cause.

22                  I will remind you of Mark Twain's line  
23 where he said: Please forgive the length of this  
24 letter. I didn't have the time to write you a short  
25 one.

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1                          Find the time to write a shorter one,  
2 please.

3                          So the motion for leave to supplement is  
4 granted limited solely to the acceptance of the Gale  
5 deposition, which is marked as Exhibit A to the  
6 moving papers.

7                          **MR. FARRELL:** Your Honor, if I could  
8 just raise one issue, I'd appreciate the Court's  
9 ruling.

10                         **SPECIAL MASTER:** Sure.

11                         **MR. FARRELL:** It would just would be if  
12 we could add to the Court's order that the materials  
13 that have in fact been produced by Johnson & Johnson  
14 or frankly any other party that's received a subpoena  
15 by the plaintiffs, that those documents be produced  
16 to the defendants as soon as possible.

17                         **SPECIAL MASTER:** This is the first I've  
18 heard of that. I don't think it should be necessary  
19 for me to remind the very good lawyers who are in  
20 this room that if you issue a third party subpoena  
21 and you get documents in response that it's your  
22 obligation to get copies of those documents to all  
23 the other parties in the case.

24                         **MR. FARRELL:** Thank you, your Honor.

25                         **SPECIAL MASTER:** That is not an

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1       earth-shattering proposition.   So if there is a  
2       problem with that, please bring it to my attention.

3       But that's pretty much pretty standard fare, guys.

4                  One down.   Three to go.   How about we  
5       turn to plaintiffs' motion for reconsideration.   Let  
6       me start that one by setting it up, as I normally do.

7                  On October 27, 2017, under ECF number  
8       368, an order was entered that required the review of  
9       the transcript of the Wengerd deposition to ascertain  
10      what objections if any plaintiffs would continue to  
11      press at the continued deposition of representative  
12      plaintiff Wengerd that was ordered as part of the  
13      that order.

14                 The order specifically provided that at  
15      least 10 days before the continued deposition that  
16      list of objections was to be provided to counsel for  
17      BASF and to me.

18                 By an e-mail dated February the 9th,  
19      2017, from Mr. Roth, he enclosed a copy of the letter  
20      he had sent to Messrs. Assaf and Farrell listing 24  
21      objections that plaintiffs would continue to press in  
22      respect of the continued deposition of representative  
23      plaintiff Wengerd and also attached a copy of the  
24      transcript.

25                 On February the 12th, 2017, BASF's

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1       counsel e-mailed a letter objection to 18 of the 24  
2       assertions of privilege made by the plaintiffs.

3                          On February the 14th, under ECF number  
4       434, an order was entered overruling plaintiffs'  
5       objections and ordering that representative plaintiff  
6       Wengerd answer all 18 questions and advising that,  
7       and I quote, any failure to abide by the terms of  
8       this order shall be punishable as contempt, unquote.

9                          On February 16, 2017 -- I'm sorry.  
10      We're in 2018. All these dates starting with  
11      February 9th are in 2018.

12                          Under ECF number 442, plaintiff filed  
13      this reconsideration motion raising four points.  
14      First, that questions about the Williams case and not  
15      the underlying case are subject of proper privilege.  
16      And those would be questions 1, 2, 4, 7, and 22.  
17      And the numbering is from Mr. Roth's original  
18      February 9, 2018, letter.

19                          Second, that question 5 is moot, as Miss  
20      Wengerd actually answered it later on.

21                          Third, the questions as to the mediation  
22      that had been in this case before, questions 15 and  
23      16, are privileged.

24                          And fourth, that the questions as to  
25      damages, which are questions 8, 12, 20, 21, and 23,

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1 also are privileged

2                   That same day -- and I remind everyone  
3 that February the 16th was a Friday -- I sent an  
4 e-mail to everyone asking that any opposition to  
5 plaintiffs' reconsideration application be filed by  
6 February 21st, quote, so that it can be argued with  
7 the other pending motions on Friday, February 23,  
8 2018, unquote.

9                   On February 17th, Mr. Roth impressed  
10 everyone by telling us he was working on a Saturday,  
11 and he requested that I, quote, modify the response  
12 schedule so we can have a ruling before plaintiff  
13 Wengerd's February 21, 2018, deposition.

14                  I will note that that was the first time  
15 I was advised that the deposition was occurring on  
16 February 21.

17                  **MR. ROTH:** Actually, I hate to disagree  
18 with your Honor --

19                  **SPECIAL MASTER:** I know you want to  
20 disagree with me. But I will tell you that I have with  
21 me your February 9 e-mail with your letter, neither  
22 of which says the deposition is occurring on February  
23 21.

24                  **MR. ROTH:** Your Honor e-mailed me back  
25 about 20 minutes later to ask when the deposition was

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1 taking place. And I responded with an apology,  
2 saying I apologize for not mentioning it in my  
3 initial letter, the deposition is taking place on  
4 February 21st.

5 And that happened on February 9th, your  
6 Honor.

7 **SPECIAL MASTER:** Okay.

8 **MR. ROTH:** I think as we work our way  
9 through this, and I hope the blood is not showing,  
10 but there's been a lot that's happened since then.

11 **SPECIAL MASTER:** You redeemed yourself  
12 later on, Mr. Roth. I'm getting there.

13 **MR. ROTH:** Okay.

14 **SPECIAL MASTER:** On that same day, I  
15 sent an e-mail to Mr. Roth denying the modification  
16 of the response schedule.

17 Again that same day Mr. Roth sent an  
18 e-mail saying that they would just simply reschedule  
19 the Wengerd deposition.

20 That evening Mr. Farrell sent an e-mail  
21 objecting to the rescheduling of the deposition of  
22 representative plaintiff Wengerd.

23 I note all of this is on a Saturday.

24 And let me also say that in those e-mails everybody  
25 was apologizing for interfering with my weekend.

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1                   Let me repeat again what I've said  
2 before. I am here to help you get to where you need  
3 to be. And as you can tell, I do read your stuff in  
4 real time and I try to respond in real time. So you  
5 don't need to apologize for doing your job.

6                   So in the future, just assume that I'm  
7 going to add words at the beginning of whatever  
8 communication you have that say I'm really sorry for  
9 being a pain and just skip that and just go on to the  
10 subject matter.

11                  The next day I got an e-mail from Mr.  
12 Roth responding to Mr. Farrell's objections.

13                  I then sent an e-mail to both Messrs.  
14 Roth and Farrell explaining the procedural posture of  
15 this matter.

16                  On the 20th I received an e-mail from  
17 Mr. Roth advising that the parties have agreed to  
18 adjourn the Wengerd deposition.

19                  Quite frankly, that's exactly what the  
20 parties should have done without any intervention.

21                  That same day I sent an e-mail to Mr.  
22 Roth talking about what the limited issues were and  
23 discussing his proposal for a Federal Rule of  
24 Evidence 502(d) order.

25                  On February 21, under ECF 444, BASF

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1 filed its response, advising that the plaintiffs had  
2 agreed to withdraw most of their motion for  
3 reconsideration. The only issues that remained were  
4 questions 1 and 5 and 9 and 22. And basically  
5 BASF's objection is that plaintiffs had failed to  
6 meet the reconsideration standard that is in local  
7 Civil Rule 7.1(i).

8                           Mr. Roth, are you going to be speaking  
9 to this?

10                          **MR. ROTH:** Yes, your Honor. I was  
11 going to say Mr. Coren will, but we did that the last  
12 time.

13                          **SPECIAL MASTER:** He took a beating over  
14 this before.

15                          **MR. PLACITELLA:** I thought I took the  
16 beating.

17                          **SPECIAL MASTER:** You deserved the  
18 beating. There's a difference.

19                          **MR. PLACITELLA:** Not the first time.

20                          **MR. ROTH:** I think your Honor's sized up  
21 where the parties are in you are e-mail of February  
22 22nd.

23                          And to the extent there are issues with  
24 respect to privilege, it is regarding communications  
25 in the Williams case.

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1                   Mr. Assaf actually summarized where we  
2        were pretty well I think in his February 22nd letter.  
3        When Miss Wengerd's deposition was adjourned, we did  
4        take the deposition of another class  
5        representative --

6                   **SPECIAL MASTER:** Miss Holley.

7                   **MR. ROTH:** -- Miss Holley that  
8        continued. Mr. Assaf and I had, without the Court's  
9        intervention and any e-mails over any long holiday  
10      weekends that I'm no longer apologizing to, although  
11      I thought my last e-mail apologized to everybody, not  
12      just your Honor, were able I think to navigate the  
13      issues of the privilege.

14                  Our position is that any communication  
15      between a class representative and their lawyers in  
16      the Williams case, which would be Cohen, Placitella &  
17      Roth, or Jeff Pollock from Fox Rothschild, is  
18      privileged.

19                  **SPECIAL MASTER:** I got that. But my  
20      problem is what about those instances where Mr. Bevan  
21      was also present? He's not acting as counsel.  
22      Doesn't that destroy the privilege?

23                  **MR. ROTH:** In our view it does not  
24      destroy the privilege.

25                  **SPECIAL MASTER:** Why not?

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1                   **MR. ROTH:** Because there's two -- I  
2 mean, he's still their counsel in certain ways, your  
3 Honor. And the divide that Judge Linares recognized,  
4 the limited waiver, relates to communications with  
5 Mr. Bevan and his clients and the facts he was told,  
6 decisions and recommendations he made in the  
7 underlying cases.

8                   We agree to the -- the issues -- or the  
9 conversations that have been put in issue is what he  
10 knew, what he told his clients, and what  
11 recommendations he made to his clients in the  
12 underlying cases.

13                  **SPECIAL MASTER:** In respect of the  
14 disclosure or non-disclosure of documents or  
15 information by BASF.

16                  **MR. ROTH:** At that point he would not  
17 have known whether things were not disclosed.

18                  **SPECIAL MASTER:** Right. But he now  
19 does, since your client had put that matter at issue.

20                  **MR. ROTH:** Right.

21                  **SPECIAL MASTER:** Chief Judge Linares has  
22 said very clearly that because it is at issue, you  
23 cannot claim privilege.

24                  So if you've got somebody in the room in  
25 respect of whom you cannot claim privilege, doesn't

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1 he serve to destroy the privilege because he is an  
2 outsider?

3 **MR. ROTH:** With respect to the  
4 underlying claims, we cannot prove privilege -- we  
5 cannot claim privilege.

6 With respect to counsel, he may have  
7 given them about -- you know, they say to him: Mr.  
8 Bevan, you know, Placitella, Coren and Roth, you  
9 know, should I do something here?

10 That, your Honor, is privileged.  
11 That's legal advice that they are seeking. They  
12 still have a legal relationship with him. That is  
13 not --

14 **SPECIAL MASTER:** I don't know how that's  
15 legal advice. Should I do something with them? That  
16 doesn't help.

17 **MR. ROTH:** Fair enough, your Honor.  
18 Should I go forward in a class action arising from  
19 what they describe occurred here? Mr. Bevan, how  
20 long will this case go? Mr. Bevan, is there -- you  
21 know, what do I do as a class representative?

22 I don't know that he's had any of those  
23 conversations. But to the extent that he has had  
24 them, those are privileged and those are not waived.

25 **SPECIAL MASTER:** I agree with you --

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1                   **MR. ROTH:** Right.

2                   **SPECIAL MASTER:** -- to a degree. My  
3 problem is I'm dealing with a very truncated record,  
4 because I have a question, for example, question  
5 number 1, and the colloquy appears on the deposition  
6 transcript at page 12, lines 5 to 23.

7                   Question: And what was the nature of  
8 that communication?

9                   That's subject matter. And  
10 attorney/client privilege was interposed.

11                  Then the question became: Did you speak  
12 to Mr. Bevan on Tuesday about the Williams case or  
13 something else?

14                  That's not privileged. Okay. That's  
15 not asking for advice. Did you discuss a certain  
16 subject matter? That's not privileged.

17                  But you got an attorney/client  
18 privilege.

19                  **MR. ROTH:** Well, because what was the  
20 substance of that -- what was the nature of that  
21 conversation, your Honor, is a question that could  
22 yield an answer that is attorney/client privilege.

23                  **SPECIAL MASTER:** Only if you go further,  
24 because if the answer is we discussed the Williams  
25 case, then you've got a privilege. But if the answer

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1       is we discussed my original claim that I settled or  
2       otherwise disposed of based upon the information that  
3       I got, that's been waived. So I don't know enough.

4                   **MR. ROTH:** And I think this is why --  
5       one of the challenges in looking at the questions  
6       that are listed here and even in the letter attaching  
7       the appendix, there's ambiguity in terms of the way  
8       the questions are asked. There is agreement about  
9       the nature of information that can be revealed.

10                  If my client is asked what was the  
11      nature of the communication, I think all of us know,  
12      it's not always clear what a client -- how a client  
13      is going to answer a question, in my view that risks  
14      revealing attorney/client communication.

15                  Did you speak with Mr. Bevan on Tuesday  
16      about the Williams case or something else, you know,  
17      that question is not attorney/client privilege.

18                   **SPECIAL MASTER:** But an assertion was  
19      made.

20                  **MR. ROTH:** Well, I'm moving past these  
21      four questions, which I don't expect would be  
22      repeated in this way, your Honor.

23                  And the example of the Holley deposition  
24      that we took on the 21st, you know, I think reflects  
25      the success of how we were able to work this out.

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1       The issue is not so much --

2                   **SPECIAL MASTER:** So let me just make  
3       sure I understand.

4                   **MR. ROTH:** Yeah.

5                   **SPECIAL MASTER:** What you're telling me  
6       is, without telling me, that if we get to the  
7       continued deposition of representative plaintiff  
8       Wengerd and a more artful question is presented on  
9       this subject matter, she will be allowed to answer  
10      it?

11                  **MR. ROTH:** Yes, your Honor.

12                  **SPECIAL MASTER:** Okay.

13                  **MR. ROTH:** We spent a fair amount of  
14       time on this, Mr. Assaf and I. And, you know, again,  
15       the questions which we've used here, because we had  
16       to identify 10 questions, really are a reflection.  
17       The issue is what's the -- because there may be a  
18       question that we object to because it is inartful or  
19       we think it's --

20                  **SPECIAL MASTER:** Because it is what?

21                  **MR. ROTH:** Inartful or raises the  
22       prospect of revealing an attorney/client privilege.  
23       What we know and what we are not -- well --

24                  **SPECIAL MASTER:** Well then isn't it your  
25       objection an objection to the form of the question

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1 instead of asserting the privilege?

2                   **MR. ROTH:** If the question is -- in my  
3 view, if the question is what was the nature of that  
4 communication, I'll object and say that raises the  
5 risk of attorney/client privilege. If the question  
6 is did you speak to Mr. Bevan --

7                   **SPECIAL MASTER:** See, I don't agree with  
8 you on that. I don't agree. I even think that as  
9 open-ended a question as what was the nature of that  
10 communication is asking for the topic, not for what  
11 was discussed.

12                  **MR. ROTH:** To me that question is what  
13 did you talk about with Mr. Bevan.

14                  **SPECIAL MASTER:** What did you talk  
15 about, yeah.

16                  **MR. ROTH:** Well, so what did you talk  
17 about is --

18                  **SPECIAL MASTER:** We talked about the  
19 Williams case, period.

20                  **MR. ROTH:** Okay.

21                  **SPECIAL MASTER:** And at that point  
22 that's a hard stop. But if the answer is we talked  
23 about what happened in my prior case --

24                  **MR. ROTH:** There's no dispute about  
25 that.

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1                           **SPECIAL MASTER:** How do we know that  
2 unless the witness is allowed to answer?

3                           **MR. ROTH:** So I'm agreeing with you,  
4 your Honor.

5                           **SPECIAL MASTER:** Okay.

6                           **MR. ROTH:** And I agree with Mr. Assaf  
7 about that. And that's the substance of it.

8                           I mean, the testimony that we -- the  
9 questions that we would object to are those that  
10 impugn the attorney/client privilege that exists in  
11 the Williams case, period.

12                          To the extent that it's the underlying  
13 case, to the extent it's conversations or why did you  
14 make a decision about -- you know, why did your  
15 mother make a decision to settle her underlying case,  
16 there is no objection.

17                          When it was close, one of two things  
18 happened in the Holley deposition. Mr. Assaf  
19 rephrased his question or I objected, advised the  
20 client that this is something I would not allow you  
21 to answer, and we agreed on a 502 -- that it would be  
22 under a 502 order if the issue had to be resolved.

23                          So, you know, I think in large measure  
24 we have worked out --

25                          **SPECIAL MASTER:** We have detente here.

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1 You've agreed on the rules on which you're going to  
2 proceed --

3 **MR. ROTH:** I think we've agreed on the  
4 rules on the road, your Honor.

5 **SPECIAL MASTER:** -- short of mutually  
6 assured destruction.

7 **MR. ROTH:** Well, when you're sitting  
8 there with an order that tells you you're going to  
9 run the risk of contempt --

10 **SPECIAL MASTER:** It does have a salutary  
11 effect, doesn't it?

12 **MR. ROTH:** And I don't want to find  
13 myself in the middle of a deposition where I'm in  
14 good faith asserting an attorney/client privilege on  
15 Williams communication to come back and be told I've  
16 wasted their time and money going to Cleveland to  
17 take Miss Wengerd's deposition, I've wasted your  
18 Honor's time, and I'm writing all of these from  
19 some -- I don't know where you put people in civil  
20 contempt these days.

21 But I wanted to avoid all of that. So  
22 I think we've worked out the process.

23 With respect to the other questions,  
24 your Honor, there are questions about damages for  
25 which we will make our objection, we will not

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1 instruct witnesses not to answer. Frankly, some of  
2 these just seem improper.

3 **SPECIAL MASTER:** But I'm sure that if  
4 the question is improper because of form, you would  
5 say I object to the form, it's misleading, this is  
6 what I would suggest, because that's what good  
7 lawyers do.

8 **MR. ROTH:** Right.

9 **SPECIAL MASTER:** And the good lawyer on  
10 the other side is going to say thank you, let me ask  
11 that question.

12 And they're going to do it not  
13 necessarily because they agree with you, but because  
14 that moves the deposition along.

15 **MR. ROTH:** Right.

16 **SPECIAL MASTER:** It's practical.

17 **MR. ROTH:** Well, I try not to make a  
18 speaking objection. And then they're going to ask  
19 the question that they want to ask.

20 And I think that we see the world  
21 differently on the propriety of these questions, your  
22 Honor, but some of them asking -- you know, the  
23 example I gave in the letter, what would your mother  
24 have been paid if there been an honest record,  
25 there's no purpose in my view to that.

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1                           **SPECIAL MASTER:** I can see the purpose  
2 to it. But an answer of I have no idea would be  
3 perfectly proper, too.

4                           **MR. ROTH:** Right. But we're not seeking  
5 reconsideration on those.

6                           **SPECIAL MASTER:** Well, let me just give  
7 you a sense of where I'm coming from and maybe we can  
8 reach agreement on how to do this.

9                           As you've said, discussions by any of  
10 the representative plaintiffs with Mr. Bevan about  
11 the original cases, those are fair game. That  
12 privilege has been waived.

13                          Discussions with Mr. Bevan about this  
14 case are a little more problematical because Mr.  
15 Bevan is not representing those plaintiffs in this  
16 case. So I don't know what the attorney/client  
17 relationship is in respect of this case. Somebody's  
18 going to have to flesh that out for me at some point  
19 if it becomes an issue.

20                         Because of that, I'm troubled by  
21 discussions between the Cohen, Placitella & Roth firm  
22 and the representative plaintiffs where Mr. Bevan is  
23 also a party to those discussions, because he is not  
24 there to provide legal advice. Cohen, Placitella &  
25 Roth, counsel of record, are there to do that, which

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1 means he's a stranger to that conversation, which in  
2 my book destroys the privilege, because you've  
3 allowed a third party in.

4 I'm just telling you where I'm coming  
5 from, okay, so that when you folks sit down and  
6 retake this deposition, you understand that if you  
7 get to a juncture where you reach an impasse and you  
8 say: Well, let's call the Special Master and have  
9 him call the question, you understand where I'm going  
10 to be coming from.

11 **MR. ROTH:** The issue that you're  
12 raising, your Honor, has not come up in the  
13 questions. It hasn't been briefed.

14 Frankly, we would demonstrate to you  
15 that there's a common interest that applies here  
16 under New Jersey law. And when the time comes,  
17 we'll brief that.

18 **SPECIAL MASTER:** Mr. Bevan has no common  
19 interest with anybody here.

20 **MR. ROTH:** Well, I think that because  
21 you and -- you know, and I've read Mr. Assaf's papers  
22 where he is a fact witness in some regard --

23 **MR. ASSAF:** A critical fact witness.

24 **MR. ROTH:** Where he is, as Mr. Bevan  
25 says, a critical fact witness --

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1                           **SPECIAL MASTER:** Mr. Assaf says.

2                           **MR. ROTH:** As Mr. Assaf says. And Mr.

3     Bevan may say it too.

4                           But that does not eliminate the fact  
5     that he also serves as their counsel in cases that  
6     are going forward here. And so --

7                           **SPECIAL MASTER:** I'm sorry, I need you  
8     to say that last little piece, in cases that are  
9     going forward.

10                          **MR. ROTH:** He is --

11                          **SPECIAL MASTER:** Is he the counsel of  
12     record for any cases on behalf of any of the  
13     representative plaintiffs that are still going  
14     forward?

15                          **MR. ROTH:** Yes, your Honor.

16                          **SPECIAL MASTER:** Which one?

17                          **MR. ROTH:** Miss Holley.

18                          **SPECIAL MASTER:** Miss Holley?

19                          **MR. ROTH:** Yeah. And I'm not sure about  
20     others where there are bankruptcy claims that have  
21     been filed that --

22                          **SPECIAL MASTER:** Well, don't we need to  
23     know that?

24                          **MR. ROTH:** Sure.

25                          **SPECIAL MASTER:** Okay. And I think

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1       counsel for BASF is entitled to know that too in  
2       order that they could properly gauge what objections,  
3       if any, they can fight.

4                     The net result of all of this -- and I  
5       honestly don't think this merits that long of a  
6       discussion. And I don't think we really need to hear  
7       from BASF in respect of this.

8                     You know where I'm coming from. I have  
9       no doubt that now that everyone kind of understands  
10      what the rules of game are, that you'll be able to  
11      work these things out in the continued deposition of  
12      Miss Wengerd and of anybody else, frankly, in this  
13      case who might have similar claims.

14                   When is her continued deposition going  
15      to be taken?

16                   **MR. ROTH:** We've talked about March 6th.  
17      I have some dates for Mr. Assaf for some other  
18      clients. But it's going to be lined up pretty  
19      promptly.

20                   **SPECIAL MASTER:** Okay. Good. Well,  
21      what I'm going to do is I'm going to deny the motion  
22      for reconsideration without prejudice based on what  
23      I've described here today.

24                   But I fully expect counsel to work  
25      cooperatively to work out any privilege objections

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1       that may still exist in respect of the continued  
2       deposition of representative plaintiff Wengerd.

3                 If you get to an impasse, and I hope you  
4       don't, but if you do, you all have my phone number,  
5       so give me a call. And if you get the voicemail, one  
6       of the bad things about the year of our Lord 2018 is  
7       that we're not untethered anymore. Our system sends  
8       me an e-mail that tells me I have a voicemail that I  
9       can listen to from wherever I am. So I can run from  
10      you, but I cannot hide.

11               And again, do not be shy. If you need  
12       help getting through something, call me. And don't  
13       apologize for it. That's what I'm here for.

14               **MR. ROTH:** Thank you, your Honor. As I  
15       said, I think the example of the Holley deposition  
16       proves that we can work this stuff out.

17               **SPECIAL MASTER:** I have no doubt. I  
18       have no doubt. You're all really fine lawyers.  
19       This can be an acrimonious case. But I'm hoping that  
20       most of the acrimony has been expended in the prior  
21       seven years and we can move on without it, since this  
22       case next month will be seven years old.

23               **MR. ASSAF:** Your Honor, I appreciate  
24       your order. And I'm not going to -- I've learned  
25       enough that I'm not going to say anything.

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1                   But I do want to put a marker down. I  
2   don't want you to think that the Bevan issues are  
3   going away.

4                   I think the collateral issues that we've  
5   already identified, I think five of the six of them  
6   have to do with Mr. Bevan. And so I think we're  
7   going to come back to this issue because there are  
8   complex issues regarding Mr. Bevan, what he knows and  
9   when we're going to find it out.

10                  **SPECIAL MASTER:** I appreciate that, Mr.  
11 Assaf. But I guess my hope is that if we get to that  
12 juncture, we get to it further down the pike, because  
13 the evolution of this application was 24 assertions  
14 of privilege, 18 objections, which meant that you  
15 conceded that six of those were proper or perhaps you  
16 didn't think they were worth the fight. But either  
17 way --

18                  **MR. ROTH:** I'll take the concessions,  
19 your Honor.

20                  **MR. ASSAF:** It's the latter, your Honor.

21                  **MR. ROTH:** I think it's the first one  
22 from Kirkland & Ellis. I'll take them right now.

23                  **MR. ASSAF:** The first one since 2011.

24                  **SPECIAL MASTER:** Cherish it. I don't  
25 think you'll get many more.

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1                   But it went from 24 to 18. And it's now  
2 four and -- not really four.

3                   So if you guys could work your way to  
4 that before you kind of throw your hands up and say,  
5 okay, we can't really resolve it among ourselves,  
6 that would be what I would be looking for.

7                   **MR. ASSAF:** Fair enough, your Honor. I  
8 appreciate that. And I think we're aligned. One of  
9 the points in the letter and one of the points that  
10 Mr. Roth and I discussed was actually getting a  
11 little more of a record so that your Honor has a full  
12 record and understands all the issues.

13                  And so that's what we're trying to do.  
14 And I think we're all aligned on that.

15                  **SPECIAL MASTER:** Okay. And as you know  
16 by now, if you send me something, I read it.  
17 Sometimes I actually understand it. So I'm here to  
18 try to help you get there.

19                  **MR. ASSAF:** Thank you.

20                  **MR. ROTH:** Thank you, your Honor.

21                  **SPECIAL MASTER:** Two down. Two to go.

22                  Let's talk about plaintiffs' motion to  
23 compel. I'm going start a little bit differently  
24 than the motion itself because this is a motion that  
25 really refers back to an order that was entered on

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1       October 27, 2017, under ECF 365, where the  
2       application by plaintiffs seeking an order to compel  
3       BASF to produce, and I quote, any indemnification,  
4       forbearance, standstill, settlement, arbitration,  
5       joint defense, or like agreements related to this  
6       litigation or to this and similar litigations by and  
7       between BASF and any or all of BASF's codefendants  
8       was denied without prejudice, specifically because  
9       the application was made in the absence of a showing  
10      of particularized need.

11                  Now, with that as backdrop, on January  
12      24, 2018, plaintiffs filed ECF 414, which was their  
13      motion to compel first a declaration by defendants as  
14      to whether they will seek allocation of fault at  
15      trial and the production of all documents regarding  
16      any settlement or other agreement among defendants  
17      that affect their liability to one another for claims  
18      arising from the case.

19                  Plaintiffs recognize that there are no  
20      cross-claims asserted between the defendants.

21                  They state that the denial in ECF 365  
22      was based on a lack of knowledge as to the existence  
23      of the agreements.

24                  I'm not altogether sure that is correct.  
25      I just read what the order provides. And it says

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1       that it's in the absence of a showing of  
2       particularized need.

3                   Plaintiffs ask that defendants be  
4       required to advise whether those agreements exist  
5       and, if so, to produce them.

6                   They say the agreements are probative of  
7       bias or motive. They claim that, quote, if  
8       defendants have reached a settlement between them  
9       where they have agreed they will not seek  
10      apportionment of fault at trial or will not point the  
11      finger at one another, plaintiffs have a right to  
12      know that, unquote.

13                  Plaintiffs claim a particularized need,  
14       saying that the settlements among defendants, quote,  
15       could influence the record testimony being developed  
16       and must be disclosed, unquote.

17                  They assert that the documents are  
18       needed for breach of duty claims. I'm not sure what  
19       claims are referred to there.

20                  Specifically, plaintiffs argue four  
21       separate things.

22                  First, that the New Jersey Joint  
23       Tortfeasor Contribution Act gives, quote, plaintiffs  
24       the right to know whether defendants have agreed not  
25       to blame one another at trial for the torts alleged

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1 or if they are not seeking contribution.

2 And in support thereof, the plaintiffs  
3 cite to Young versus Latta and Jones versus Morey's  
4 Pier, Inc.

5 Plaintiffs assert that, quote, BASF must  
6 disclose any settlement releases or similar covenants  
7 with its codefendants because plaintiffs have the  
8 right to know whether it will seek apportionment at  
9 trial, unquote.

10 Second, they argue that the production  
11 of settlement agreements should be compelled because  
12 they may prevent BASF from invoking attorney/client  
13 privilege and are probative of each defendant's bias.  
14 They claim that it may lead to abolishing the  
15 privilege under New Jersey Statute 2A:84A-20(2)(c).

16 For those of you not in the know, that  
17 is the New Jersey attorney/client privilege statute.  
18 We're going to talk a little bit more about that  
19 later.

20 They say that the settlement agreements  
21 are probative of bias and therefore there's a  
22 particularized need because of the bias or are  
23 necessary to establish some other material issue in  
24 the case and that at the very least the settlement  
25 agreements, if they exist, should be produced for in

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1 camera inspection.

2 On January 24, 2018, under ECF 415, BASF  
3 filed a letter saying that the plaintiffs had failed  
4 to satisfy the requirements of local Civil Rule 37.1  
5 in respect of conducting a meet and confer.

6 And on February 5, 2018, under ECF 424,  
7 BASF filed its formal opposition to plaintiffs'  
8 motion to compel, asserting the following: First,  
9 plaintiffs' request was denied earlier and nothing  
10 had changed, that the motion is really nothing more  
11 than a request for reconsideration without satisfying  
12 the reconsideration standards, and there was no  
13 showing of particularized need.

14 Second, there is no waiver of the  
15 attorney/client privilege, and they say that the  
16 statute I just cited applies only in conflicts  
17 between lawyers and their clients, not third parties.

18 And it's probably helpful to  
19 specifically read that section into the record. And  
20 that is that the attorney/client privilege, quote,  
21 shall not extend to a communication relevant to an  
22 issue of breach of duty by the lawyer to his client  
23 or by the client to his lawyer.

24 Third, they argue that defendants are  
25 not required to disclose now whether they intend to

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1 argue allocation of fault at trial. They say that  
2 New Jersey Court Rule 4:7-5(c) on which plaintiffs  
3 relied does not apply in federal court.

4                         Made me remember my first year of civil  
5 procedure class with Professor Schlesinger.

6                         They also say that that Rule applies  
7 only to settlements between plaintiffs and  
8 defendants, not settlements among defendants, that  
9 plaintiffs identify no other requirement that BASF  
10 disclose any allocation of fault agreements now.  
11 Therefore, the application is premature and that  
12 allocation of fault does not equal waiver of the  
13 attorney/client privilege.

14                         On February 5, 2018, under ECF number  
15 425, Cahill Gordon filed their opposition to  
16 plaintiffs' motion to compel. They state that  
17 plaintiffs' request is not required by law and in any  
18 event is premature, that plaintiffs again failed to  
19 make a showing of particularized need.

20                         They distinguish Young versus Latta, one  
21 of the cases relied on by the plaintiffs, and that  
22 there should be no in camera review without a prior  
23 showing of particularized need.

24                         On February 12 under ECF number 430,  
25 plaintiffs filed their reply, essentially saying that

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1 the local Civil Rule 37.1 meet and confer requirement  
2 would have been futile under the circumstances, that  
3 it is not reconsideration because of the prior motion  
4 was denied without prejudice, so it's a brand new  
5 motion, that plaintiffs are entitled to know if  
6 defendants will seek apportionment at trial, that the  
7 Comparative Negligence Act, not the Joint Tortfeasor  
8 Act, allows disclosure, that the disclosure  
9 encourages settlement, that these agreements would be  
10 proof of bias, motive, or scienter, and they are  
11 probative of whether BASF waived the attorney/client  
12 privilege, finally, that the disclosure is required  
13 under Federal Rule of Civil Procedure 34(b)(2)(C),  
14 which requires disclosure of whether responsive  
15 documents to a request for production are being  
16 withheld.

17 And my final notation on this page is  
18 Groundhog Day. I'm referring not to the special  
19 event that happens in February in Punxsutawney,  
20 Pennsylvania, but to the movie of that title.

21 **MR. COREN:** Your Honor, if you're asking  
22 who's going to be speaking to it on the plaintiffs'  
23 side, I'm going to speak.

24 **SPECIAL MASTER:** I was waiting to see  
25 who was going to volunteer.

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1                           **MR. COREN:** Me.

2                           **SPECIAL MASTER:** Good. Mr. Coren, the  
3 floor is yours.

4                           **MR. COREN:** Thank you. Your Honor, it's  
5 not groundhog's day. We're here because we're at a  
6 point where we're entering into discovery and, quite  
7 candidly, we have a right to know what positions are  
8 going to line up by the defendants amongst  
9 themselves.

10                          **SPECIAL MASTER:** What's the basis of  
11 that right?

12                          **MR. COREN:** The basis -- and, you know,  
13 we got chastised for citing a New Jersey Rule. I went  
14 back and looked at the section where we cite to that  
15 and actually we're citing to the rule, meaning the  
16 rule of law. And that's the rule in Young versus  
17 Latta.

18                          And that rule states, and I'm going to  
19 quote the Court: A plaintiff should know as early in  
20 the case as possible whether a defendant will seek to  
21 prove the fault of a codefendant. Plaintiff should  
22 conduct their discovery accordingly.

23                          Now, your Honor, we got the answers.

24                          And the answers didn't have a cross-claim.

25                          **SPECIAL MASTER:** Doesn't that tell you

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1       that they're not going to be seeking something  
2       against the other codefendants?

3                   **MR. COREN:** No, it doesn't, your Honor.

4                   **SPECIAL MASTER:** On what basis can they  
5       make that assertion if there's no cross-claim?

6                   **MR. COREN:** Well, your Honor, Young  
7       versus Latta said you don't need to file a  
8       cross-claim because down the road somebody could  
9       settle and that they could pursue their cross-claim.

10                  That is what happened actually in Young  
11      versus Latta.

12                  And then if we skip to the most recent  
13      decision, Morey --

14                  **SPECIAL MASTER:** But stay with me, okay.  
15      Let's stay with Young versus Latta, because in the  
16      Young versus Latta circumstance where you had an  
17      agreement -- well, you had a question of  
18      contribution between a non-settling defendant and a  
19      settling defendant. But that settling defendant  
20      settled with the plaintiff, not with the codefendant.

21                  **MR. COREN:** That is the fact pattern.  
22      But as from Young -- that was the first instance.  
23      But Young is the starting point of a series of cases  
24      from the 90s going up to as most recently 2017, your  
25      Honor.

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1                           **SPECIAL MASTER:** Well, before we get to  
2 Morey's Pier, let's talk about Young versus Latta,  
3 because that is the starting point. And doesn't  
4 Young versus Latta also say that a non-settling  
5 defendant is entitled to a credit for the settlement  
6 paid by the settling defendant equal to the  
7 allocation made by the jury?

8                           **MR. COREN:** Yes.

9                           **SPECIAL MASTER:** So it's a question of  
10 the non-settling defendant getting a credit for what  
11 the settling defendant paid to the plaintiff.

12                          **MR. COREN:** Yes.

13                          **SPECIAL MASTER:** And it's based upon the  
14 allocation that is made by the jury, who may or may  
15 not be told that the empty chair defendant settled  
16 with the plaintiff.

17                          And in fact, under New Jersey law, when  
18 that jury verdict form is given to the jury, there is  
19 a list of every defendant and it's the jury's  
20 obligation to outline percentages of fault, because  
21 it may have an effect on whether the plaintiff  
22 recovers at all. Right?

23                          **MR. COREN:** Understood, your Honor.

24                          **SPECIAL MASTER:** Okay.

25                          **MR. COREN:** Okay. But before there was

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1      Young versus Latta, there were did two statutes, the  
2      Tortfeasors Contribution Act and the comparative,  
3      which gives us those percentages. So there were the  
4      statutes.

5                    **SPECIAL MASTER:** Right. The statutes  
6      have to be applied somehow. And I'm using the  
7      practical application.

8                    **MR. COREN:** Correct. And Young versus  
9      Latta was the first foray.

10                  And if we now jump to 2017 when they  
11     come back with Morey's Pier to revisit the issue,  
12     they cement the fact that these trials are going to  
13     have allocation issues. So before there's a  
14     settlement, there's an allocation issue.

15                  So we have a right to know if these  
16     people are going to sit there and try to lay off the  
17     blame on each other, and then why, what evidence do  
18     you have, and go to delve into it, because when we  
19     look, for example, in the answer of BASF, they said:  
20     Well, it could be caused by the fault of other  
21     people. But they don't identify the other people.  
22     That's paragraph 12 -- excuse me. Bear with me.

23                  **SPECIAL MASTER:** It should be an  
24     affirmative defense.

25                  **MR. COREN:** Yes, it was an affirmative

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1 defense, your Honor. It's on their affirmative  
2 defense 14: Plaintiffs' damages if any were  
3 proximately caused by the acts or omissions of other  
4 persons or things for which BASF Catalyst is not  
5 responsible and over which BASF Catalyst lacks  
6 control.

7 Well, who is that? Because all the  
8 other defendants in this case were BASF lawyers.  
9 And gosh-darn, BASF had control over their lawyers.

10 So who are we referring to? If they're  
11 going to sit there and make allocation arguments --

12 **SPECIAL MASTER:** Well, you're arguing  
13 against yourself, because if you're saying that BASF  
14 had control over its lawyers, then that affirmative  
15 defense doesn't apply.

16 **MR. COREN:** We agree. But that's why  
17 we're saying they have never come forward and said  
18 whether they are going to make allocation arguments.

19 **SPECIAL MASTER:** I understand that.  
20 They have not done that.

21 But what they have done is not assert a  
22 cross-claim against the only other set of defendants  
23 in this case, which are the lawyers. That has not  
24 happened. And the lawyers have not cross-claimed  
25 against BASF. There are no cross-claims here.

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1                           **MR. COREN:** But in New Jersey, as your  
2 Honor knows, while we can never suggest a dollar  
3 amount, we can suggest allocations. And if there's  
4 going to be suggestions of allocations that cut  
5 across the ones that we make, we have a right to do  
6 that.

7                           And that's the lesson in -- that's why  
8 we get that language in Young versus Latta, the rule,  
9 that a plaintiff should know as early in the case as  
10 possible whether a defendant will seek to prove the  
11 fault of a codefendant. Plaintiff should conduct  
12 their discovery accordingly.

13                          And that's why we came back to you, when  
14 we get now to the crime fraud exception, because now  
15 when we get to the crime fraud exception -- and I'm  
16 not trying to preview my colleagues' case, but it's  
17 going to pop up, that on page 12 of BASF's response  
18 to the crime fraud, they state the following:  
19 Starting in the late 1980s, Cahill served as  
20 Engelhard's national counsel in personal injury  
21 lawsuits alleging that Emtal talc was contaminated  
22 with asbestos. Cahill recommended to Engelhard  
23 long-range strategy and short-term tactics on an  
24 overall basis for all jurisdictions generally as well  
25 as in specific jurisdictions. While local counsel

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1 always were consulted and provided input, all  
2 substantive recommendations to Engelhard as to how to  
3 respond to those lawsuits in both the long and  
4 short-term were made by Cahill.

5 So that language suggests now that they  
6 are saying all of the blame lies on Cahill. Sorry to  
7 point. Okay. So at this point --

8 **SPECIAL MASTER:** Well, stop. Stop.

9 Assume all of that is true. Lawyers are only the  
10 agents of their principal.

11 So even if they were to say that, isn't  
12 BASF saying well, it was my agent who screwed up --  
13 if someone screwed up, it was my agent. Oh, by the  
14 way, I happen to be liable for the action of my  
15 agent?

16 How are you -- I don't get the logic.

17 **MR. COREN:** Are they going to say that,  
18 your Honor? Or are they going to say Cahill went  
19 rogue? Are they going to say: Hey, we told Cahill  
20 everything that there was to know and Cahill told us  
21 to do this?

22 Well, that's a breach of the duty,  
23 because someone wasn't doing their job.

24 And that's why we want to see if there's  
25 any agreements out there to see if anyone happens to

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1 be making a malpractice claim against anybody or --  
2 you know, in good faith, because at that point in  
3 time, your Honor under C has to take that under into  
4 account.

15 And I think the reason there's no case  
16 law that holds it is because it just doesn't make any  
17 sense.

18                           **MR. COREN:** No, your Honor. If Cahill  
19 has to defend themselves because all of a sudden BASF  
20 is now saying no, it was Cahill, we told them, we're  
21 exonerated, they went rogue, Cahill has the right to  
22 come back and say: Unh-unh, you knew what was going  
23 on, misery loves company. If anything, we're not all  
24 responsible. You're not responsible.

25 We haven't heard Cahill -- one peep from

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1 them saying no in response to that, it wasn't us or  
2 we were just doing our client's bidding faithfully.  
3 Okay.

4 And that statute was written broad.

5 And, your Honor, with respect, I disagree with you.  
6 The statute, the exceptions -- the privilege is read  
7 narrowly, not the exceptions. Okay. The  
8 legislature used broad language. They knew what a  
9 malpractice case was. They didn't limit it to a  
10 malpractice case.

11 **SPECIAL MASTER:** I'll tell you candidly,  
12 I read your argument in respect of that, and I just  
13 don't agree with it.

14 **MR. COREN:** Understood, your Honor. You  
15 know, it's one of those things that -- hopefully you  
16 will agree that I can read it that way and it's a  
17 permissible reading, whether you agree with it or  
18 your reading is different.

19 **SPECIAL MASTER:** I am a firm believer  
20 that everyone has the right to be wrong. And many  
21 people exercise that right quite freely.

22 So go ahead.

23 **MR. COREN:** Also it ties in, your Honor,  
24 that, hey, we have to know who's doing what to whom  
25 and how in this case.

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1                           **SPECIAL MASTER:** Why do you care? I  
2 don't get that.

3                           **MR. COREN:** Because if I want to settle  
4 this case with -- say I want to settle the case with  
5 Mr. Halket, who wants to go out. I need to know if  
6 there's any agreements or what are the claims and  
7 waive that in, because at a certain point in time I  
8 may find that Cahill and BASF are laying the blame if  
9 I settle with Mr. Halket on Mr. Halket. Okay. They  
10 become liability syncs or like lightning rods.

11                          **SPECIAL MASTER:** So it's not litigation  
12 purposes but settlement purposes that you think  
13 entitles you to get this information?

14                          **MR. COREN:** It's one of the reasons  
15 we're entitled to it. And in fact --

16                          **SPECIAL MASTER:** Can you show me any  
17 authority under New Jersey substantive law that says  
18 that you have a right to discover information because  
19 it's going to help you in settlement, not in  
20 litigating the case?

21                          **MR. COREN:** No, it's not so much to help  
22 in settlement. It helps you evaluate a settlement.  
23 Okay. And that is legitimate. And quite candidly,  
24 courts foster those conditions.

25                          The object is to sit there and to get

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1 the facts out so people could weigh and people could  
2 assess it. That is an impediment that is being put  
3 up.

4 Also, defendants at trial will seek to  
5 put the fault on whoever we do try to settle with or  
6 if we are successful. So we need to -- you know, at  
7 that time it has to come out.

8 But in a case like this, we don't have  
9 the luxury with a case approaching its seventh  
10 birthday to be redoing discovery. People have to  
11 know candidly who is doing what to whom and why in  
12 this case. What are the positions? Are you going  
13 to --

14 **SPECIAL MASTER:** You say that like  
15 that's black letter law.

16 **MR. COREN:** It is. Under Young versus  
17 Latta it is.

18 **SPECIAL MASTER:** I disagree with you. I  
19 don't think that's black letter law. I don't think  
20 you have this absolute right, as you say, to get  
21 settlement agreements.

22 We argued that the last time around.  
23 And I ended up deciding that based on Third Circuit  
24 precedent, you only get a settlement agreement on a  
25 showing of particularized need.

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1                   So I'm sitting here saying to myself:

2        Okay, where is the particularized need?

3                   And I haven't heard anything yet that  
4        tells me, okay, this is the particularized need.

5                   And I will tell you that saying I need  
6        it in order to settle the case, that doesn't cut it.  
7        And I don't mean to be rude about it. But it just  
8        doesn't do it.

9                   ~~MR. COREN:~~ Your Honor, the whole  
10       purpose of discovery is to let the parties know what  
11       they're going to have to meet at trial. We all  
12       learned that at law school and that hasn't changed  
13       one iota, proportionality, any of these changes.  
14       That is the touchstone.

15                  We have a right to know if they are  
16       going to do an allocation -- take a position on  
17       allocation, we have a right to know what facts  
18       they're going to adduce to prove their allocations,  
19       because at the end of the case, no matter whether  
20       they settle or not, the jury's going to be charged to  
21       put a percentage on BASF, Mr. Halket, Mr. Dornbusch,  
22       Mr. Sloane, Cahill in general, all of them.

23                  So if they're going to sit there at  
24       trial and come forward affirmatively, fine, tell us  
25       now so we can take discovery on that basis. You

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1 could, you know, set aside the allocations. But  
2 otherwise, we're going to wind up blind at trial.  
3 And that's what Young versus Latta says, no, at the  
4 earliest time. And this --

5 **SPECIAL MASTER:** Let me try to put it in  
6 a different setting for you.

7 Let's assume that you get to trial and  
8 the defendants have not told you that they are going  
9 to seek allocation. They haven't put you on notice  
10 so that you can't get discovery in respect of the  
11 allocation issues. And you get to trial.

12 Do you think the trial judge is going to  
13 allow allocation under those circumstances?

14 **MR. COREN:** Under Morey I don't believe  
15 so, your Honor.

16 **SPECIAL MASTER:** That's what I was  
17 getting to.

18 **MR. COREN:** Under Morey, no.

19 **SPECIAL MASTER:** So Morey's Pier tells  
20 me that the defendants have a choice to make. They  
21 can either put you on notice of allocation, which  
22 would then allow you to conduct some discovery hither  
23 or yon, or they don't. But if they don't, they run  
24 the risk of not being allowed to seek allocation at  
25 trial. Right?

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1                   **MR. COREN:** Yes, your Honor.

2                   **SPECIAL MASTER:** So is that really your  
3 call to make is it theirs? They're the ones who are  
4 running the risk here, not you.

5                   **MR. COREN:** The problem is, your Honor,  
6 is they have now made the case un settleable against  
7 any marginal player in this particular case. Okay.

8                   And I think that that cuts against us,  
9 because part and parcel of getting the facts out is  
10 to be able to make these kind of decisions.

11                  And once again, they're taking and  
12 they're chilling that right by not at least putting  
13 the cards on the table. And all we're --

14                  **SPECIAL MASTER:** We're going in -- we're  
15 arguing in circles here, because you say that it  
16 helps you settle the case. And I said to you  
17 helping you settle the case is not a particularized  
18 need. And you need particularized need in order to  
19 get disclosure of a settlement agreement. So where  
20 are we?

21                  **MR. COREN:** Well, moving along, your  
22 Honor, also to the extent that you disagree with us  
23 whether it reaches -- you know, it violates or --  
24 excuse me, triggers is the word I was looking for --

25                  **SPECIAL MASTER:** That's okay.

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1                   **MR. COREN:** -- triggers section C, okay,  
2       of the lawyer/client privilege statute.

3                   **SPECIAL MASTER:** The exception to the  
4       lawyer/client privilege statute.

5                   **MR. COREN:** Correct. Or what I call  
6       the section C exception. We get to explore whether  
7       there are facts out there that will trigger that,  
8       okay, because you may disagree with me, but on appeal  
9       somebody may agree with me.

10                  So let us at least get the facts out on  
11      the table. Okay. What harm is it going to be to  
12      find to -- look, if they don't want to give us the  
13      agreement because of some confidentiality or  
14      privilege, then they should give it to you in camera.

15                  **SPECIAL MASTER:** And what am I to do  
16      with it?

17                  **MR. COREN:** To see whether or not  
18      there's, for example, in the preambles or the  
19      recitals, there are any admissions or anything in  
20      there that bear upon the subject. We don't know.

21                  Is there an indemnity in there, your  
22      Honor. And at that point in time that indemnity  
23      creates a bias issue that we are entitled to and  
24      courts have time and time again -- time in and time  
25      out found was a particularized need, allowing the

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1 settlement agreement to go. So it might very well  
2 be.

3 But sitting here -- first of all, one,  
4 are there agreements? Could we finally get on the  
5 record somewhere that there are settlement  
6 agreements?

7 **SPECIAL MASTER:** I don't know that they  
8 need to disclose that to you yet. I really don't.

9 I think you have the burden of making  
10 the initial showing of particularized need. Once you  
11 do that, then I would look at it in camera ex parte  
12 and make determinations in respect of it.

13 But I don't get to my step until you've  
14 satisfied yours. Right?

15 **MR. COREN:** Yes. And I believe that we  
16 have, given the circumstances of this particular  
17 case. We have people already starting to point the  
18 finger at the other side. We need to know -- you  
19 know, and it all bears upon -- if they're going to  
20 make an allocation, if those agreements affect  
21 whatever the allocation is or if they've given up an  
22 allocation right with an agreement, then we get to  
23 know that because the way these statutes run, it may  
24 affect it.

25 You're asking me to look what I don't

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1 know what is in there to tell you anything more,  
2 other than the circumstances of this case justify  
3 them at least giving you that agreement.

4                   **SPECIAL MASTER:** Let me tell you what  
5 I'm having real trouble with. And that is your  
6 reliance on what BASF wrote about what happened in  
7 this matter 30 years ago in their opposition to your  
8 crime fraud motion.

9                   I didn't see Cahill Gordon or any of the  
10 Cahill Gordon defendants take issue with that  
11 description. There's nothing that was filed that  
12 said, oh, by the way, the way that BASF described it,  
13 that wasn't right, that's not how it happened.

14                  **MR. COREN:** And if there's a settlement  
15 agreement where Cahill's exonerated, that may be the  
16 reason why we're not seeing them say, oh, gosh-darn,  
17 that ain't what happened.

18                  And that's one of the reasons why you  
19 need to see that agreement.

20                  **SPECIAL MASTER:** Okay. Is there  
21 anything else?

22                  **MR. COREN:** No, sir.

23                  **SPECIAL MASTER:** On BASF's side, who  
24 will speak to this?

25                  **MR. ASSAF:** Mr. Bress.

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1                           **MR. BRESS:** Your Honor, Dan Bress for  
2                           BASF.

3                           Judging by your comments, I think I'm  
4                           going to shorten what I have to say.

5                           **SPECIAL MASTER:** That's very wise.

6                           **MR. BRESS:** I'm happy to answer any  
7                           questions. But on the settlement agreement --

8                           **SPECIAL MASTER:** Don't follow Mr.  
9                           Assaf's example of writing 14 notes and having to  
10                          talk about each and every one.

11                          **MR. BRESS:** We've got a lot of notes  
12                          here and they're all blank, your Honor.

13                          I think with respect to this motion,  
14                          your Honor, there are really two features of it. One  
15                          was the settlement agreements. Your Honor has  
16                          already ruled on that. Nothing has changed. There's  
17                          no particularized need.

18                          And with respect to the second piece of  
19                          this, it essentially asks for an early disclosure  
20                          about whether BASF intends to blame another party at  
21                          trial.

22                          Our position is that that request is  
23                          vastly premature and that the New Jersey Rules and  
24                          case law that are being cited don't apply in federal  
25                          court and that we don't have an obligation at this

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1 time before discovery has even begun in earnest and  
2 when there's no trial date to make the kind of  
3 disclosure that Mr. Coren is claiming needs to be  
4 made.

5 **SPECIAL MASTER:** But you do accept the  
6 fact that if you are going to seek allocation at  
7 trial, you're going to have give the plaintiffs  
8 notice of that.

9 **MR. BRESS:** But the question, your  
10 Honor, is when. And I don't think --

11 **SPECIAL MASTER:** Well, the case law says  
12 at the earliest practicable moment.

13 **MR. BRESS:** Well, but that --

14 **SPECIAL MASTER:** And so at some point or  
15 another, that cat's going to have to come out of the  
16 bag one way or the other, because the risk you run as  
17 a matter of New Jersey substantive law is you will  
18 not be allowed to seek allocation if you don't give  
19 them notice, because they are entitled to know  
20 whether you are going to.

21 Now, the question is here when are they  
22 entitled to know that? I'm not so sure that now is  
23 the right time.

24 But be that as it may, the choice is  
25 yours to make. And that is I'm going to disclose it

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1 and therefore preserve the right to seek allocation  
2 at trial, or I'm not going disclose it, but I'm going  
3 to be foreclosed from seeking allocation at trial,  
4 because that's what Jones versus Morey's Pier, Inc.  
5 says.

6 **MR. BRESS:** Yeah. To me, your Honor,  
7 those cases involve a slightly different situation  
8 where the plaintiff is not actually prosecuting a  
9 claim against the defendant. You either have a  
10 settling defendant or an absent defendant. That's  
11 not the case here.

12 **SPECIAL MASTER:** Well, in Jones versus  
13 Morey's Pier you had a defendant who was dismissed  
14 because they didn't -- it was a governmental agency  
15 against whom a timely Tort Claims Act notice had not  
16 been filed, and therefore you had no cause of action  
17 under New Jersey law.

18 But the Court did say that in those  
19 circumstances the defendant was entitled to make a  
20 third party claim against the dismissed defendant  
21 saying that they were negligent and that that  
22 negligence was the proximate cause of the plaintiff's  
23 damages.

24 So even though dismissed, they still say  
25 on the verdict sheet, because the jury could say yes,

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1 we find the defendant liable, but the defendant's  
2 liability is based upon the third party defendant's  
3 liability, and there's no recourse against the third  
4 party defendant because they've been dismissed for  
5 failure to satisfy the Tort Claims Act.

6 **MR. BRESS:** And that's all true, your  
7 Honor. But the point that I would make is that when  
8 you're talking about an early disclosure obligation,  
9 the point of that is to put the plaintiffs on notice  
10 that some party not in the case may be blamed at  
11 trial that allows the plaintiff to take what's  
12 essentially third party discovery against either that  
13 settling defendant or that absent defendant.

14 That's not the case here. The  
15 plaintiffs have sued Cahill Gordon. They've sued  
16 Arthur Dornbusch. They have an obligation in  
17 discovery and an incentive to prosecute those claims.

18 So I think it's quite different than  
19 Jones and Young, because in those cases, had the  
20 defendant not disclosed that there was some potential  
21 third party out there they were going to blame, the  
22 plaintiffs wouldn't have a reason to build up in  
23 discovery whatever responses they were going to make.

24 That's not true here. Here everybody  
25 is in the room and the plaintiffs have an obligation

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1 having filed suit against everyone to build their  
2 claim against everyone.

3                   **SPECIAL MASTER:** I understand what the  
4 plaintiffs' obligation is.

5                   But I want to go back to what I think is  
6 the core question in this application. And that is  
7 do you agree that if you do not give the plaintiffs  
8 notice of allocation, however that comes out, and  
9 that it's done in sufficient time for them to prepare  
10 for trial, you will not be able to seek allocation at  
11 trial?

12                  **MR. BRESS:** Your Honor --

13                  **SPECIAL MASTER:** The sine qua non of the  
14 latter is the former.

15                  **MR. BRESS:** Your Honor, I'm not aware of  
16 a requirement in federal court that would require  
17 that. We haven't even seen the plaintiffs' case at  
18 trial and we're allowed to react to that. But I  
19 will say, your Honor --

20                  **SPECIAL MASTER:** You're in a New Jersey  
21 case, sitting in diversity, which Rudy Schlesinger  
22 would have said you use the federal procedure under  
23 Erie Railroad versus Tompkins, but you look at the  
24 substantive law of New Jersey.

25                  The substantive law of New Jersey in

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1       this aspect is the Comparative Negligence Act and the  
2       Joint Tortfeasor Contribution Act.

3                   And when you read those together and you  
4       read the case law that interprets those two statutes,  
5       you come away with the conclusion, at least I do,  
6       that if you want to seek allocation at trial as a  
7       defendant, you need to notify the plaintiff at some  
8       point so that they can prepare to meet those  
9       allocations squarely.

10                  It's no different than any other part of  
11      your case as a defendant. You have to let the other  
12      side know. That's the way we work.

13                  Now, the question is when do you need to  
14      do it? That's a different issue.

15                  My question to you is much more  
16      fundamental than that. And that is do you agree that  
17      as a condition precedent of being able to seek  
18      allocation at trial, it is your obligation to provide  
19      the plaintiffs notice?

20                  **MR. BRESS:** Your Honor, I don't think  
21      we're having a fundamental disagreement. We're  
22      having a --

23                  **SPECIAL MASTER:** Well, I'm looking for a  
24      really simple yes or no answer. So help me out.

25                  **MR. BRESS:** Your Honor, I think that at

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1 some point in these proceedings we would make that  
2 kind of disclosure.

3 **SPECIAL MASTER:** Okay. Is that a yes?

4 **MR. BRESS:** Yes, it's a yes.

5 **SPECIAL MASTER:** Okay. Thank you. You  
6 can start with yes and then explain. But I'd like  
7 an answer to my question.

8 And you're telling me yes, you have that  
9 obligation. I appreciate that because, in candor, I  
10 don't think there's any question that you do. So  
11 you're giving me the sleeves off your vest. All  
12 right.

13 **MR. BRESS:** Your Honor, our central  
14 point is just the obligation is not triggered now.  
15 And that's what the application asks us to disclose  
16 now. We don't think we have that obligation at this  
17 time.

18 **SPECIAL MASTER:** So your answer is not  
19 that I don't have the obligation, it's just not  
20 mature yet, it's not ripe?

21 **MR. BRESS:** Correct, your Honor.

22 There's been very few depositions even in the case.

23 **SPECIAL MASTER:** Anything else, Mr.  
24 Bress.

25 **MR. BRESS:** I do not, your Honor. Thank

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1 you.

2 **SPECIAL MASTER:** Mr. Coren, you get the  
3 last word.

4 **MR. COREN:** Thank you, your Honor.

5 **SPECIAL MASTER:** I get the last word.

6 You get before the last word.

7 **MS. GUSSACK:** Your honor --

8 **SPECIAL MASTER:** Oh, I'm sorry. My  
9 apologies. I'm so sorry. You're over to the left  
10 and I didn't see you. But you did file --

11 **MS. GUSSACK:** Yes, we do have -- Mr.  
12 Boise would like to address the Cahill response to  
13 the motion.

14 **MR. BOISE:** Your Honor, just a point.  
15 We're certainly reserving the right as to what law to  
16 apply to a claim.

17 What ultimately you have here, we're  
18 still in the class certification stage of this and  
19 what the shape of trial will look like is uncertain,  
20 what the relief requested is uncertain.

21 And to make defendants decide on trial  
22 strategy, to make that decision and then describe  
23 that decision to plaintiffs before those events are  
24 also premature.

25 Those are the only two points I wanted

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1 to make.

2                   **SPECIAL MASTER:** Okay. But don't we  
3 have to start from the proposition that you have a  
4 diversity case venued in New Jersey, so that by  
5 definition -- or I shouldn't say by definition. By  
6 default the substantive law of New Jersey would  
7 apply, unless at some point somebody comes in and  
8 says no, under choice of law principles the  
9 substantive law of someplace else applies.

10                  Well, the choice of law principles you  
11 will be applying will be New Jersey's choice of law  
12 principles because that's where you default to first.  
13 The forum states substantive law.

14                  No one's made a choice of law  
15 application in this case yet. It may be that you're  
16 giving me a heads-up that one may be coming soon.

17                  And I see everybody over there is  
18 nodding your heads up and down, which I guess I  
19 should gird myself for.

20                  But until now there has not been a  
21 choice of law application made.

22                  So I'm presuming, as I think I'm not  
23 only entitled to but I'm required to, that the  
24 substantive law we're talking about is New Jersey  
25 law.

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1                   Under New Jersey law, we are where we  
2 are, which is if you want to make an allocation  
3 argument, you got to give notice. I don't think  
4 that's real complicated.

5                   And I know Mr. Bress fought me on it,  
6 but he eventually came to the side of the angels. So  
7 I guess I'm going to have to wait until I hear from  
8 you on a choice of law application.

9                   But until then, I understand your  
10 argument about the ripeness of this application. And  
11 I guess I'm going to have to abide the latter until I  
12 get a choice of law motion that we'll need to address  
13 one way or the other.

14                  Did I cover your points?

15                  **MR. BOISE:** You did, your Honor.

16                  **SPECIAL MASTER:** Okay.

17                  **MR. COREN:** If I may, your Honor.

18                  **SPECIAL MASTER:** Yes, Mr. Coren.

19                  **MR. COREN:** Thank you. First off all,  
20 the Third Circuit rule that New Jersey law applies  
21 because of the positions that were taken, Judge  
22 Linares also has held that New Jersey law applies in  
23 one of his opinions. We'll get you the citations for  
24 that, but it's 350 F.3rd, page 317 with respect to  
25 the Third Circuit.

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1                   The ship has sailed, your Honor, on the  
2 issue of choice of law. New Jersey law is the law  
3 of the case in this matter.

4                   **SPECIAL MASTER:** Well, was the -- I  
5 don't remember choice of law being argued.

6                   **MR. COREN:** Yes, it was argued. And the  
7 Third Circuit actually addresses it in the opinion.

8                   **SPECIAL MASTER:** What page?

9                   **MR. COREN:** 317.

10                  **SPECIAL MASTER:** Okay.

11                  **MR. COREN:** 316-317, your Honor.

12                  **SPECIAL MASTER:** Okay. Bear with me for  
13 one second.

14                  Okay. 317. Choice of law. Actually  
15 the discussion starts at 316.

16                  **MR. COREN:** Correct, your Honor. My  
17 apology.

18                  **SPECIAL MASTER:** That's okay. What it  
19 says is that the parties did not litigate the choice  
20 of law question before the District Court. The  
21 plaintiff claimed that it was under New Jersey law.  
22 Quote: BASF and Cahill both agreed that New Jersey  
23 law applied and, moreover, the choice of law issues  
24 may be waived. Thus, to the extent the parties may  
25 have sought the application of other law to the tort

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1 claims, they have waived their right to do so.

2 **MR. COREN:** Yes, sir. Judge Linares  
3 later will repeat that.

4 **SPECIAL MASTER:** And as you can see,  
5 that was all previously highlighted.

6 **MR. COREN:** Understood. There's a lot  
7 of paper in front of your Honor. But I felt duty  
8 bound to call that to your attention. I don't  
9 believe other --

10 **SPECIAL MASTER:** You may bear that in  
11 mind, Mr. Boise.

12 **MR. BOISE:** I understand that, your  
13 Honor. We're preserving that issue. That was in the  
14 context of a motion to dismiss where facts were  
15 assumed to be true.

16 And it's our position going forward and  
17 at the time and now that that issue has not been  
18 waived beyond the motion to dismiss stage.

19 I understand plaintiffs' position. It's  
20 an issue that will I think be litigated in the  
21 future. It's just another point of not acknowledging  
22 here in the face of a direct question whether New  
23 Jersey law necessarily applies to this particular  
24 issue of allocation. I want to make sure that I'm  
25 preserving the record for the very reason that Mr.

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1 Coren just raised.

2                   **SPECIAL MASTER:** Okay. I understand  
3 that. I just read Judge Fuentes' opinion where he  
4 clearly says it's been waived.

5                   **MR. BOISE:** Thank you, your Honor.

6                   **SPECIAL MASTER:** And he on the preceding  
7 page goes through the discussion of whether choice of  
8 law can in fact be waived. And he determines that  
9 in the Third Circuit it can and then says in fact it  
10 has been waived.

11                  So you'll do what you think is  
12 appropriate in respect of representing your client.  
13 Nobody's going to hold that against you.

14                  But I would suggest you might want to  
15 take a real hard look at pages 316 and 17 of the  
16 Third Circuit's opinion.

17                  **MR. BOISE:** I assure you we have, your  
18 Honor.

19                  **SPECIAL MASTER:** Okay.

20                  **MR. COREN:** Your Honor, if I may wrap  
21 up, as they said in Young, a plaintiff should know as  
22 early in the case as possible whether the defendant  
23 will seek proof of fault from a codefendant, which  
24 begets the question if not now, when? Because the  
25 law says --

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1                   **SPECIAL MASTER:** If not us, who, if  
2 you're going to quote the Kennedys.

3                   **MR. COREN:** Plus, we're --

4                   **SPECIAL MASTER:** Mr. Placitella has  
5 sworn he will never play me in Trivial Pursuit.

6                   **MR. COREN:** Nor will I, your Honor.

7 Once again --

8                   **MR. PLACITELLA:** Although sometimes it  
9 feels like we're playing here, but...

10                  **SPECIAL MASTER:** No slice of the pie for  
11 you today.

12                  **MR. COREN:** And, your Honor, we don't  
13 think that we're asking for the sun. We may have  
14 asked for an awful lot of things on that first  
15 go-around.

16                  But here we're coming in with a very,  
17 very narrow request. We want to know whether there  
18 are agreements. If there are settlement agreements,  
19 we believe your Honor should see and review them,  
20 because if there's any factually in there that begets  
21 and helps illuminate the issues, then I think we're  
22 entitled to those under general discovery.

23                  Thank you, your Honor.

24                  **SPECIAL MASTER:** Thank you. Anybody  
25 else? No.

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1                   My determination is informed principally  
2 by the procedural posture of this case. We have  
3 been moving along with the instruction I have been  
4 operating under that this case is to be made trial  
5 ready as soon as possible.

6                   There were to me two large thresholds  
7 that needed to be addressed before we could get to  
8 that point.

9                   One of them was the class certification  
10 motion, because that will define the scope and extent  
11 of factual and expert discovery that the case needs.  
12 And it seemed to me that people's efforts were better  
13 served focusing on that first.

14                  And as a corollary to that, a  
15 determination of plaintiffs' assertion that the  
16 communications between BASF and its counsel at  
17 Cahill -- and BASF will forgive me, but I use BASF as  
18 a shorthand for Engelhard also -- but that the  
19 communications between BASF and its counsel at Cahill  
20 should be produced because the crime fraud exception  
21 or the Kozlov exception would vitiate the assertion  
22 of attorney/client privilege.

23                  We're on our way to getting some  
24 illumination in respect of the second one of those.  
25 And we've at least started the process in respect of

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1 the first, which is the class certification motion.

2                   Given the position we are in, it seems  
3 to me that the request is premature, so I really  
4 don't have to reach the substance of it.

5                   If I had to reach the substance of it, I  
6 still would have a little bit of trouble with the  
7 particularized need part that caused me to deny that  
8 same application back in October.

9                   So I'm going to deny this motion. And  
10 again, it's without prejudice. The plaintiffs may  
11 bring it back. It will not be a motion for  
12 reconsideration. So you don't have to do it within  
13 the next 10 days. Bring it back after we know a  
14 little bit more of where this case is headed, because  
15 candidly, I don't think that any of the concerns that  
16 plaintiffs have raised today or in their moving  
17 papers would still be in existence if class  
18 certification is denied.

19                   So that would be a very different case  
20 than the case we have right now and also a very  
21 different case from a case if class certification is  
22 granted.

23                   So it strikes me that everyone's efforts  
24 in this room are best directed towards dealing with  
25 the class certification issue, because I'm going off

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1 the top of my head, but I think we're talking about  
2 having a class certification hearing in September.

3 **MR. FARRELL:** October.

4 **SPECIAL MASTER:** October. That's seven  
5 months from now. You guys got a lot of things to  
6 do. You've got fact discovery in respect of it.  
7 That ends in May?

8 **MR. ASSAF:** May 21st.

9 **SPECIAL MASTER:** And then you've got  
10 expert discovery that ends shortly after that. You  
11 got a lot of stuff to do that I think is important  
12 that you do first before we go that route.

13 So I'm not saying you're never going to  
14 get it. But I'm simply not in a position today to  
15 make that determination. But I'm likewise not in a  
16 position to say you should get it today.

17 So the motion is denied without  
18 prejudice. Any reapplication will not be a motion  
19 for reconsideration. And we'll address it at a more  
20 timely date.

21 **MR. COREN:** Thank you for hearing us,  
22 your Honor.

23 **SPECIAL MASTER:** My pleasure.

24 **MR. BRESS:** Thank you, your Honor.

25 **SPECIAL MASTER:** Thank you. We've been

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1 at this now for close to two hours and we're about to  
2 get to the other than that, Mrs. Lincoln, how did you  
3 like the play motion, so why don't we take a short  
4 break.

5 (Break.)

6 **SPECIAL MASTER:** The final formal motion  
7 that is before us is the plaintiffs' crime fraud  
8 slash Kozlov motion.

9 On November 2nd, 2017, by order and  
10 under docket number ECF number 370, plaintiff filed a  
11 motion to determine the applicability of the crime  
12 fraud and Kozlov exceptions to defendant's privilege  
13 claims.

14 By way of background, there are two  
15 claimed bases for disclosure. The first is the  
16 exception to the attorney/client privilege that's  
17 codified at New Jersey Statutes Annotated  
18 2A:84A-20(2)(a), that also appears as New Jersey Rule  
19 of Evidence 504(2)(a).

20 It states that the attorney/client,  
21 quote, privilege shall not extend to a communication  
22 in the course of legal services sought or obtained in  
23 aid of the commission of a crime or fraud, unquote.

24 The separate basis is In re: Kozlov,  
25 which is a Supreme Court of New Jersey decision at 29

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1 N.J. 232, 1979, which sets forth a three-part test  
2 for the waiver of a privilege or for the exception to  
3 the privilege.

4                   The first part is that there must be a  
5 legitimate need of the party to reach the evidence  
6 sought to be shielded; second, there must be a  
7 showing of relevance and materiality of that evidence  
8 to the issue before the Court; and C, it also must be  
9 shown to the satisfaction of the trial judge by a  
10 fair preponderance of the evidence, including all  
11 reasonable inferences, that the information could not  
12 be secured from any less intrusive source.

13                  Plaintiffs assert two bases for saying  
14 that the communications between BASF and its counsel,  
15 Cahill, should be produced, arguing that the crime  
16 fraud exception applies and that plaintiffs should be  
17 allowed to participate in any evidentiary hearing  
18 concerning the specific documents.

19                  I note that because, even though the  
20 title of the motion talks about the Kozlov exception,  
21 it appears in a footnote and only in a footnote in  
22 plaintiffs' opening brief, and that would be footnote  
23 22, page 37.

24                  I'm not going to say that the Kozlov  
25 exception has been waived, but it certainly did not

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1 receive any kind of prominence like the exception to  
2 the attorney/client privilege was argued.

3 According to plaintiffs, this involves a  
4 two-step process.

5 First is an evaluation of the factual  
6 basis for a good faith belief that the exception  
7 should apply; in other words, a *prima facie* showing  
8 that the exception should apply. And if there has  
9 been that *prima facie* showing, then there's an ex  
10 parte *in camera* evaluation of the privilege by the  
11 Court.

12 In going through that process,  
13 plaintiffs explain that we apply a reasonable basis  
14 standard, and that is whether there is a reasonable  
15 basis to suspect that the privilege-holder was  
16 committing or intending to commit a crime or fraud  
17 and that the attorney/client communication or  
18 attorney work product were used in furtherance of the  
19 alleged crime or fraud.

20 Plaintiffs state that if the reasonable  
21 basis standard is met, an *in camera* review follows.

22 Plaintiffs argue that the exception does  
23 not need to fall within the definition of crime or  
24 fraud and provide a number of citations in support,  
25 but none of them are from the Third Circuit.

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1                   Plaintiffs presume that the destruction  
2       of evidence equates to spoliation once there's been  
3       proof of that, a point that is at issue.

4                   Plaintiffs assert that spoliation is  
5       anathema to the privilege and that the crime fraud  
6       exception applies where a party makes untrue factual  
7       representations because that constitutes a fraud on  
8       the Court.

9                   Plaintiffs assert that deliberate  
10      misrepresentations in this case warrant application  
11      of the exception.

12                  Plaintiffs do concede that, quote,  
13       ordinarily crime fraud exception evidentiary hearings  
14       are conducted ex parte, but then claim that because  
15       they already are privy to the information from the  
16       state cases, they should be allowed to participate  
17       here and that the Samson record before Justice Stein  
18       serving as a special master should be simply produced  
19       here on en masse.

20                  On January 16, 2018, under ECF number  
21       408, BASF notified the clerk that their opposition to  
22       plaintiffs' motion was being submitted directly to  
23       me.

24                  And that opposition says that plaintiffs  
25       failed to make a prima facie case, they did not

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1 identify any documents, that the documents must be  
2 shown to have been in furtherance of the fraud or  
3 crime, that plaintiffs failed to satisfy the  
4 preponderance of the evidence standard, that the  
5 privilege can only be overridden if it is the  
6 client's intent to misuse legal services, the  
7 plaintiffs failed to identify a single missing or  
8 destroyed document and therefore there has been no  
9 spoliation, and finally, that any in camera review  
10 must be ex parte.

11 They claim that the plaintiffs  
12 misconstrue the governing legal standards and that  
13 plaintiffs' claims are based on factually incorrect  
14 statements about the record, that there should be no  
15 disclosure under Kozlov, arguing that Kozlov has been  
16 since limited by State versus Mauti, M-A-U-T-I, which  
17 is at 208 N.J. 519, decided in 2012.

18 And specifically Mauti says that, quote,  
19 only in the most narrow of circumstances such as  
20 where a privilege is in conflict with a defendant's  
21 right to a constitutionality guaranteed fair trial  
22 would the need prong of the Kozlov test be satisfied,  
23 unquote. That's at page 538.

24 And I note parenthetically that Appendix  
25 C to the defendant's opposition says that it's

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1       federal cases in the title. It should say it's state  
2       cases discussing the in furtherance of standard.  
3       Both of them say federal cases. And C is actually  
4       state cases. So I did read it.

5                          On January 16, 2018, by ECF number 409,  
6       Cahill advised the clerk of the court that their  
7       opposition was submitted directly to the Special  
8       Master. And that opposition essentially joins in  
9       BASF's arguments.

10                         On January 17, 2018, under ECF number  
11      410 there is a letter submitted to the clerk of the  
12      court advising that defendant Halket would submit an  
13      opposition directly to the Special Master. And in  
14      the substance of his opposition, defendant Halket  
15      joins in the BASF arguments and says pointedly that  
16      plaintiffs' claims are focused on a period that is  
17      after Halket left Engelhard.

18                         On February 2nd, 2018, under ECF number  
19      426, plaintiff filed a reply to the opposition to the  
20      motion to determine the applicability of the crime  
21      fraud and Kozlov exceptions to plaintiffs' privilege  
22      claims.

23                         I'm going to take a moment and talk  
24      about that reply. The reply consisted of a 28 page  
25      brief, plus a five page certification of counsel, a

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1 new Appendix C listing approximately 61 documents for  
2 proposed in camera review, and a new Appendix D  
3 consisting of nine pages of plaintiffs', quote,  
4 factual rebuttal of BASF's assertions, unquote, plus  
5 a new Appendix E, consisting of 44 pages of  
6 plaintiffs' spoliation appendix and new exhibits 24  
7 through 43.

8 I just want to note for the record that  
9 under our local rules, reply briefs are limited to 15  
10 pages.

11 Plaintiffs did ask for leave to file an  
12 over-length brief not to exceed 35 pages, plus two  
13 appendices. Leave was granted, noting however that,  
14 quote, adding appendices must be for their proper  
15 purpose and not as a subterfuge to exceed the page  
16 limitation. Please bear that notion in mind while  
17 submitting the reply.

18 I will note that plaintiffs since then  
19 submitted three appendices, not the two that they  
20 sought leave for, one of which again was a 44 page  
21 brief on the issue of spoliation.

22 I was largely tempted to not read it.  
23 But I did. So you may argue it. However, what  
24 weight I give to it is left to be determined.

25 Plaintiffs claim in their reply that,

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1 quote, not only they met but have exceeded their  
2 prima facie burden of proving New Jersey statutory  
3 crime fraud exception negates BASF's claim to the  
4 protection of attorney/client and work product  
5 privileges.

6 Plaintiffs claim that defendants now  
7 admit that for nearly 30 years they concealed from  
8 courts and litigants that Emtal talc contained  
9 asbestos and that this admission was long overdue,  
10 unquote.

11 Plaintiffs take the view that, quote,  
12 the only issue presently presented by plaintiffs'  
13 current motion is whether the crime fraud exception  
14 applies.

15 What is not before this Court at this  
16 stage is to determine which specific documents should  
17 be released under the crime fraud exception.

18 Plaintiffs repeat that the exception  
19 applies where there is a reasonable basis to suspect  
20 that the elements of the exception have been met.

21 They then argue seven different matters.  
22 One, that evidence of BASF's fraud is overwhelming;  
23 two, that the intent and impact of BASF's fraudulent  
24 defense was obvious and lethal; three, New Jersey's  
25 crime fraud exception does not require proof that use

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1       of legal services was in furtherance of a crime or  
2       fraud; four, specific document review of all  
3       documents produced in the Samson case should start  
4       now, saying that the document designation does not  
5       start until a prima facie showing has been made;  
6       five, that plaintiffs are entitled to participate in  
7       the ex parte hearing, if one is ordered of course;  
8       six, suggest that we simply adopt the Samson record  
9       and rule from there.   There are actually eight. I'm  
10      sorry. Seven, that we should review the Dornbusch,  
11      Sloane, Dembrow, and Halket depositions; and finally  
12      that Kozlov, quote, compels production of the claimed  
13      privileged documents to.

14                  In footnote 8, plaintiffs assert that  
15      BASF, quote, implicitly waived its privilege by  
16      claiming there is no reliable evidence demonstrating  
17      that the Emtal talc and the Johnson mine from which  
18      it came ever contained asbestos.

19                  On February 7, 2018, under ECF 247, BASF  
20      objected to plaintiffs' reply brief. BASF claims  
21      that the reply brief was improper by trying to  
22      correct deficiencies in plaintiffs' original motion  
23      that were highlighted in BASF's opposition.

24                  BASF specifically objects to the 44 page  
25      Appendix E on spoliation. BASF wants a status

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1 conference on how to deal with its reply, largely  
2 eschewing the opportunity of a sur-reply. And BASF  
3 suggests limited argument on the, quote, in  
4 furtherance of, unquote, element. BASF says that's  
5 the standard. And plaintiffs say it is not.

6 There is one more item that needs to be  
7 added in the mix here. And that is on February 6,  
8 2018, and filed on February 9, 2018, the Supreme  
9 Court of New Jersey issued an order granting BASF's  
10 motion for leave to file an over-length brief and to  
11 impound the record pending the disposition of the  
12 appeal in the Appellate Division. This has to do  
13 with the review of the Samson documents.

14 It ordered that the motion for leave to  
15 appeal is granted and the matter is summarily  
16 remanded to the Superior Court Appellate Division to  
17 consider on the merits, denying the motion for leave  
18 to file a reply brief. Apparently that was not  
19 needed.

20 So the state of the record is now that  
21 the Samson matters are before the Appellate Division  
22 with an order of sealing from the Supreme Court of  
23 New Jersey.

24 So regardless of what anybody wants, I  
25 cannot see those papers and I will not see those

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1 papers.

2 Mr. Placitella, you have the floor.

3 **MR. PLACITELLA:** Thank you, your Honor.

4 So we start from the proposition of what  
5 are we here to decide? What must the Court decide to  
6 determine whether we have established our *prima facie*  
7 case?

8 And we say the standard is there is a  
9 reasonable basis to suspect that the privilege-holder  
10 was committing or intending to commit a crime or  
11 fraud in violation of N.J.S.A. 2A:84A-20(2).

12 Of course, what we're looking here at on  
13 the substantive law, and the law we submit is pretty  
14 clear, is the New Jersey substantive law on crime  
15 fraud, while the procedural law on how we're going to  
16 approach this is governed by procedure, federal  
17 procedure.

18 In fact, Judge Schwartz in the Newman  
19 case, which we attached to our papers, actually in a  
20 very similar case where fraudulent concealment was  
21 alleged, applied the federal procedural law and the  
22 New Jersey substantive law, specifically citing both  
23 the Fellerman case in her opinion and the Jedlowski  
24 case, which we say are applicable here.

25 **SPECIAL MASTER:** Now, that was when

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1 Judge Schwartz was a Magistrate Judge, correct?

2 **MR. PLACITELLA:** Correct.

3 **SPECIAL MASTER:** She's now serving on  
4 the Third Circuit Court of Appeals.

5 **MR. PLACITELLA:** Correct. So we then  
6 have to look at what's the standard that applies for  
7 crime fraud in New Jersey. And that's the statute.  
8 Your Honor referred to it before.

9 And it talked about privilege shall not  
10 extend to a communication in the course of legal  
11 services sought or obtained in aid of the commission  
12 of a crime or fraud. It does not statutorily use  
13 the words in furtherance of.

14 **SPECIAL MASTER:** But it says in aid of  
15 the commission of.

16 **MR. PLACITELLA:** Absolutely correct.

17 **SPECIAL MASTER:** Doesn't that mean the  
18 same thing?

19 **MR. PLACITELLA:** It does not mean the  
20 same thing.

21 **SPECIAL MASTER:** Why not?

22 **MR. PLACITELLA:** Because it talks about  
23 being sought or obtained.

24 **SPECIAL MASTER:** In aid of.

25 **MR. PLACITELLA:** In aid of.

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1                           **SPECIAL MASTER:** Okay. Doesn't that  
2 sound like in furtherance of?

3                           **MR. PLACITELLA:** Well, when you look  
4 at --

5                           **SPECIAL MASTER:** Wait --

6                           **MR. PLACITELLA:** Yes.

7                           **SPECIAL MASTER:** -- English is not my  
8 native language, so you need to help me on this.

9                           **MR. PLACITELLA:** Right.

10                          **SPECIAL MASTER:** When I read in aid of,  
11 for me it's like saying in furtherance of. So you  
12 need to tell me why that's wrong.

13                          **MR. PLACITELLA:** Because in furtherance  
14 of implies that it's only acts that are happening now  
15 going forward.

16                          In aid of can go back, it can look in  
17 time as to the totality of the circumstances. So,  
18 for example, let's say --

19                          **SPECIAL MASTER:** I don't understand  
20 that. You got to explain that a little bit better.

21                          **MR. PLACITELLA:** Sure. So under the  
22 New Jersey law, if you look at, for example, a case  
23 like Jedlowski, what happened in Jedlowski was that  
24 the lawyer certified answers to interrogatories with  
25 information that was false. And they knew that

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1 information was false because of earlier information  
2 that was in the files of Owens Corning demonstrating  
3 the truth of the information.

4 So what the Court in Jedlowski, which  
5 has been cited in the New Jersey Court Rules, said  
6 that even though the truth of the information may  
7 have not been at the time in furtherance of a fraud,  
8 when you tie the two together, you can't have a lie  
9 without the truth.

10 So in aid of and in -- so what the  
11 Court has done --

12 **SPECIAL MASTER:** I'm sorry, but if I  
13 understand what you're arguing right now, you're  
14 saying that in aid of is actually a lot broader than  
15 in furtherance of.

16 **MR. PLACITELLA:** That's correct.

17 **SPECIAL MASTER:** How does that help you?  
18 Doesn't that hurt you?

19 **MR. PLACITELLA:** No, it doesn't hurt us,  
20 because what it's saying is that we are permitted to  
21 look at the totality of all the circumstances.

22 And the rule of Fellerman is the statute  
23 is to be interpreted broadly. The rule of Jedlowski  
24 is that the statute is to be interpreted broadly.

25 **SPECIAL MASTER:** But Jedlowski was a

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1       little bit different, because Jedlowski involved an  
2       affidavit or a certification taken by a lawyer that  
3       recited facts. Well, the fact that it's a lawyer is  
4       irrelevant. He's like any other factual witness at  
5       that point. And that's what the Court was treating  
6       him as and saying: Well, you have shed your attorney  
7       mantel to take the role of a fact witness. As a fact  
8       witness, then all those facts then become  
9       discoverable.

10                   **MR. PLACITELLA:** Well, that's true.

11                   **SPECIAL MASTER:** But that's not what we  
12       have here.

13                   **MR. PLACITELLA:** We absolutely have that  
14       here. And I'll explain to you why and I'll show you.

15                   We have the BASF general counsel  
16       certifying answers -- associate general counsel  
17       certifying answers to interrogatories that aren't  
18       true. And the same general counsel office has  
19       information in its possession directly contrary to  
20       the answers to interrogatories that are being  
21       certified by the same office. That's Jedlowski.  
22       That's what happened.

23                   So what Jedlowski says is you are  
24       allowed to look at the truth in order to expose the  
25       lie.

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1                   And that's why I say it's not just in  
2 furtherance of. You are allowed to -- and the law is  
3 pretty clear. Ocean Spray is the same thing. You  
4 can't have a lie -- you can't prove a lie without the  
5 truth. So you have to link the two.

6                   So what ends up happening under our law,  
7 instead of just the words -- it's kind of part of  
8 the res gestae, your Honor, where --

9                   **SPECIAL MASTER:** I hate that term.

10                  **MR. PLACITELLA:** Where you have to look  
11 at the totality of the circumstances. And that's why  
12 Fellerman says that you can't allow a Court or a  
13 litigant to operate under a misimpression of what the  
14 truth is.

15                  So under New Jersey law it is pretty  
16 clear I would submit that you get to look at all of  
17 the circumstances in making your decision.

18                  And if there is information in the files  
19 of either Cahill or BASF that contradicts what they  
20 told Courts and litigants, that information should  
21 come out regardless of whether at the time it was  
22 uttered it was at that point in furtherance of a  
23 crime. It may not have been at that point in time.  
24 But it was used in furtherance of a crime because --

25                  **SPECIAL MASTER:** But isn't your argument

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1 that every single step -- taking the argument that  
2 you advance, every single step taken here by BASF and  
3 Cahill was in furtherance of this coverup?

**MR. PLACITELLA:** That's correct.

5 That's our argument.

6                           **SPECIAL MASTER:** So why don't you stick  
7 with your facts?

8                           **MR. PLACITELLA:** And I'm going to lay  
9 the facts out. But you asked me is it exactly the  
10 same. And I'm saying that just because a statement  
11 is made at a time and it could be true and it might  
12 have been privileged at that time, if it turns out  
13 that that is part of the coverup, then it's in  
14 furtherance of the crime. So I think we're saying  
15 the same thing.

16                           **SPECIAL MASTER:** Well, but I guess --  
17 I'm still wondering why you're even arguing it.  
18 Because if your argument is that every single  
19 statement that was made was made in furtherance of  
20 the coverup --

21 MR. PLACITELLA: Correct.

22                           **SPECIAL MASTER:** -- then why aren't you  
23 embracing the in furtherance of standard?

24 MR. PLACITELLA: Well, I am not --

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1 Pratter?

2                   **MR. PRATTER:** Thank you, your Honor. If  
3 I may, the other side is arguing it's a more  
4 demanding standard. We're saying that the benchmark  
5 is as Mr. Placitella has said. And that describes  
6 the privilege to be interpreted broadly, not  
7 narrowly.

8                   **SPECIAL MASTER:** But if it satisfies --

9                   **MR. PRATTER:** So it may be, your Honor,  
10 that it meets both standard. But the point is if  
11 they're saying it's a narrower gate to go through,  
12 we're saying no, that's incorrect.

13                  **SPECIAL MASTER:** But aren't you also  
14 saying that regardless of how narrow that gate is, we  
15 get through it?

16                  **MR. PRATTER:** Yes.

17                  **SPECIAL MASTER:** Okay. I just wanted  
18 to make sure that we're arguing about something  
19 that's worthwhile arguing about.

20                  **MR. ASSAF:** I'm sorry. Did Mr.  
21 Placitella say that?

22                  **SPECIAL MASTER:** Well, it's just -- Mr.  
23 Assaf, you will have your moment.

24                  **MR. ASSAF:** Sorry.

25                  **SPECIAL MASTER:** Okay. I just want to

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1 make sure that the plaintiffs get the full  
2 opportunity to present whatever it is they want to  
3 present.

4                   **MR. PRATTER:** What I'm saying, your  
5 Honor, is we meet the standard. And if you choose to  
6 say where the standard fits, you may think it doesn't  
7 make a difference. They say it makes a difference.  
8 We don't agree. We also don't agree that their  
9 standard applies at this stage of the case in any  
10 event.

11                  **SPECIAL MASTER:** But regardless, you say  
12 even assuming the standard advanced by the  
13 defendants, you satisfy it?

14                  **MR. PRATTER:** In the search of justice  
15 and truth and what this case is all about, we think  
16 we meet the standard.

17                  **SPECIAL MASTER:** Every case is about the  
18 search of justice and truth.

19                  **MR. PRATTER:** This one in particular.

20                  **SPECIAL MASTER:** Well, this is not  
21 special that way, not in my book. They all are.

22                  But I will tell what you makes this case  
23 special in my book. And that is that at issue is  
24 the behavior of a law firm that I would describe as  
25 venerable in the practice of law. And to me that's

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1 important.

2 I've said to the people in this room,  
3 those who have been here before, my view of the legal  
4 profession and the high standard that I think it  
5 enjoys and should enjoy, so much so as I've actually  
6 joked, I married a lawyer, as you did. Mine was 38  
7 years ago.

8 **MR. PRATTER:** So was mine.

9 **SPECIAL MASTER:** So I think we're about  
10 the same time. Mr. Pratter's wife and I actually  
11 did a case together about 25 years ago, representing  
12 separate defendants.

13 **MR. PRATTER:** Venerable cuts both ways,  
14 your Honor.

15 **SPECIAL MASTER:** Oh, it does. But, you  
16 know, it's not every case that alleges that a  
17 venerable law firm engaged in a practice that, viewed  
18 independently, not in the context of this case, is  
19 one that would make everyone in this room cringe.

20 So to that extent this is a different  
21 case, at least in my book.

22 **MR. PRATTER:** I agree, it makes it  
23 really different.

24 **SPECIAL MASTER:** Okay. Sorry, Mr.  
25 Placitella, we went off on a tangent.

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1                           **MR. PLACITELLA:** Your Honor, to address  
2 your question directly, I believe contained within  
3 the New Jersey statute is the notion of in  
4 furtherance of. But the New Jersey statute is  
5 broader. They had the opportunity to adopt that  
6 language and they chose not to. It's purposefully  
7 been interpreted much more broadly than BASF would  
8 have the Court look at it. And that's my point.

9                           And in term of what makes this  
10 different, this is not a case that is enjoyable for  
11 anybody, given the circumstances.

12                           **SPECIAL MASTER:** I should hope not.

13                           **MR. PLACITELLA:** But it's also about the  
14 integrity of our profession and what we do. And in  
15 that sense, you know, it's important.

16                           And no one relishes these circumstances.  
17 No one relishes how we got here. But we're here and  
18 we have to work our way through it.

19                           And the notion -- and I'll talk about it  
20 later -- that this was a rogue law firm and, you  
21 know, there was complicity here and the client still  
22 has a lot to say about what's happening here. And  
23 this notion that somehow the Cahill firm, who  
24 deserves for all the good things they've done  
25 respect, was just acting on their own, the -- and

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1 I'll show you that the facts don't bear that out.

2 And I believe that --

3 **SPECIAL MASTER:** Well, is that at all  
4 relevant to what is before me?

5 **MR. PLACITELLA:** It is relevant in terms  
6 of the allegations by BASF that they and Engelhard --  
7 there was no client intent because the -- and they  
8 try to lay off client intent on Cahill Gordon.

9 But the facts show that there was in  
10 fact client intent. And we can talk about that.

11 **SPECIAL MASTER:** Well, the argument  
12 about client intent is under exception (2)(c), not  
13 under (2)(a). You're talking about (2)(a).

14 **MR. PLACITELLA:** Right.

15 **SPECIAL MASTER:** And not to tip my hand  
16 too much, but I will tell you I don't find the  
17 argument on behalf of finding an exception under  
18 (2)(c) to be terribly persuasive.

19 **MR. PLACITELLA:** I understand. So we  
20 get back to -- so what's the standard? We're not  
21 required to prove that we can win the case. We're  
22 not required to prove under the Third Circuit law  
23 it's more likely than not.

24 I think it does matter or that you  
25 should consider that Superior Court Judges, an

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1      Appellate Division Judge, and a former Supreme Court  
2      Justice have found a *prima facie* case. Without  
3      getting to that record, it's just information in  
4      terms of --

5                   **SPECIAL MASTER:** None of which --

6                   **MR. PLACITELLA:** -- this not in a  
7      vacuum.

8                   **SPECIAL MASTER:** None of which is final.  
9      All of which is actually before the Appellate  
10     Division on a mandatory order from the Supreme Court  
11     that they consider it on an interlocutory basis.

12                  So I don't know what I'm supposed to get  
13     from what you just said, except for the fact that  
14     this has been litigated, but the results are not  
15     final.

16                  **MR. PLACITELLA:** No. Judge Litner  
17     looked at this on a *prima facie* basis in a different  
18     case and found just from looking -- you know, that  
19     there was a *prima facie* case. I'm not going to get  
20     into more that.

21                  **SPECIAL MASTER:** But where did that get  
22     anybody? Because what happened with that case?

23                  **MR. PLACITELLA:** The case ultimately  
24     resolved.

25                  **SPECIAL MASTER:** Okay. So we have a

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1       retired Appellate Division Judge who sat as special  
2       master in a case, and there he is, who rendered a  
3       report and recommendation to a Superior Court Judge  
4       that went nowhere.

5                   I don't know what I'm supposed to do  
6       with that.

7                   **MR. PLACITELLA:** You're here to make  
8       your own independent judgment, I understand that.

9                   **SPECIAL MASTER:** Okay.

10                  **MR. PLACITELLA:** My point is that  
11       everyone who's looked at the records at least have  
12       found a *prima facie* case in New Jersey.

13                  **SPECIAL MASTER:** I will tell you a Judge  
14       Litner story parenthetically. Judge Litner, when he  
15       was on the Appellate Division, would do most of his  
16       writing at home. And he has two very small dogs.  
17       And he took great pride in the fact that he would  
18       write with the dogs on his lap because he claimed  
19       they helped him write his opinions and that they made  
20       the opinions better.

21                  And when he explained that to someone,  
22       the response that he got was: You need more dogs.

23                  So I don't know how many dogs that  
24       special master report applied, so I can't really  
25       judge it.

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1                           **MR. PLACITELLA:** Well, I can tell you  
2 when I read it, I didn't see any evidence of Alpo or  
3 anything else.

4                           **SPECIAL MASTER:** Okay.

5                           **MR. PLACITELLA:** So I'm assuming that he  
6 took the time and came to his own conclusions.

7                           **SPECIAL MASTER:** He's an excellent  
8 judge.

9                           **MR. PLACITELLA:** Right. I think it's  
10 worth pointing out that Judge Linares in this case  
11 found in fact that BASF had a duty to preserve the  
12 evidence.

13                          **SPECIAL MASTER:** Every party has a duty  
14 to preserve evidence.

15                          **MR. PLACITELLA:** Right. Well, there was  
16 some debate as to that. But it's no longer a debate  
17 in this case.

18                          **SPECIAL MASTER:** Not as far as I'm  
19 concerned.

20                          **MR. PLACITELLA:** Okay. Now, so BASF in  
21 its brief makes a number of points. I want to  
22 address a couple of them early on and then I'll  
23 address the rest during the course of argument.

24                          And essentially they make six points In  
25 their brief.

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1                   One of the points they make, and it's a  
2 significant point in their brief, is they say that  
3 our papers were faulty because we did not identify --

4                   **SPECIAL MASTER:** Mr. Placitella, I don't  
5 want to cut you short, but I think, at least by my  
6 introduction to this, you know that I've read  
7 everybody's papers. I know what their arguments are.

8                   **MR. PLACITELLA:** Okay.

9                   **SPECIAL MASTER:** So can you guide  
10 yourself accordingly.

11                  **MR. PLACITELLA:** Sure. Absolutely.

12                  **SPECIAL MASTER:** Thank you.

13                  **MR. PLACITELLA:** So the one issue is we  
14 believe that based on the public record itself that  
15 we have established a prima facie case of crime  
16 fraud.

17                  The Court, however, under the law is  
18 still permitted if it so chooses to look at the  
19 withheld documents as part of its decision in making  
20 that determination.

21                  **SPECIAL MASTER:** But typically isn't it  
22 really a two step process? Isn't it first a  
23 determination by a preponderance of the evidence that  
24 in fact that there was a good faith belief that the  
25 exception would apply? And that's got to be by a

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1        prima facie showing. And then it's only then that  
2        the in camera ex parte examination is to occur?

3                      The obligation to disclose even on a  
4        limited basis solely to the Court does not ripen  
5        until there's been a showing by a preponderance of  
6        the evidence that there is a good faith belief that  
7        the exception applies.

8                      That's language, by the way, from your  
9        brief.

10                  **MR. PLACITELLA:** Right. I actually  
11        believe if the ultimate question is, is there a  
12        reasonable basis to believe -- to suspect that the  
13        privilege-holder -- and you've quoted that before --

14                  **SPECIAL MASTER:** Right. But --

15                  **MR. PLACITELLA:** -- and then when the  
16        Court says --

17                  **SPECIAL MASTER:** -- you apply a  
18        reasonable basis to a burden of proof. And the  
19        burden of proof is preponderance of the evidence.

20                  **MR. PLACITELLA:** Well, I don't think  
21        that's how --

22                  **SPECIAL MASTER:** The answer to that is  
23        yes.

24                  **MR. PLACITELLA:** Okay. I don't believe  
25        that's how it's articulated in the cases. But

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1 doesn't sound like I'll dissuade you from that.

2                   **SPECIAL MASTER:** But a reasonable basis  
3 is not a burden of proof. Okay. A burden of proof  
4 is either preponderance of the evidence, clear and  
5 convincing evidence, beyond a reasonable doubt.

6 That's a burden of proof.

7                   And everything that you prove has to  
8 satisfy a burden of proof. If what you have to  
9 prove is that there is a reasonable basis to believe,  
10 the question is how do you have to prove that? To  
11 what level do you have to go?

12                  And the answer to that is you're  
13 subjected to what I think is the lowest level of  
14 proof, which is a fair preponderance of the evidence,  
15 which means only that it's more likely than not.

16                  **MR. PLACITELLA:** Well, I believe that  
17 the cases articulate an even lower burden. But  
18 taking --

19                  **SPECIAL MASTER:** There is no lower  
20 burden.

21                  **MR. PLACITELLA:** But even taking that  
22 burden, I believe that we've more than satisfied  
23 that.

24                  **SPECIAL MASTER:** Okay.

25                  **MR. PLACITELLA:** But what the case law

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1 does say is that if the Court is not satisfied for  
2 some reason that the publicly available information  
3 establishes a prima facie case, you can actually look  
4 at the documents as part of making that  
5 determination.

6                   **SPECIAL MASTER:** So you can go to step  
7 two to determine whether step one is satisfied.

8                   **MR. PLACITELLA:** Yes. It says -- and if  
9 you look at In re: Grand Jury, it says that a factual  
10 basis adequate to support a good faith belief by a  
11 reasonable person that an in camera review may reveal  
12 evidence.

13                  So you can actually look at the  
14 documents if you so choose. We don't think you need  
15 to do that. I'm just saying that the law will allow  
16 you to do that.

17                  We believe that based upon the publicly  
18 available information we more than satisfy the prima  
19 facie case.

20                  And so what is the crime or fraud that  
21 we believe? And we've articulated it in detail in  
22 our brief, that there was a misrepresentation to  
23 courts and litigants that there was no asbestos in  
24 the Emtal talc, there was misrepresentations that  
25 there was ever any testimony to that effect to courts

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1 and litigants.

2                   And it's not insignificant, but that  
3 once dismissals were obtained, those dismissals were  
4 used to secure other dismissals as precedent. And  
5 courts were told about that. Courts that were in  
6 charge of administering justice were purposely  
7 misled.

8                   Any one of those things I would submit  
9 to you is more than enough to satisfy our low burden.  
10 But we have a multiple level set of circumstances,  
11 any one of which justifies it.

12                  And also, because I know we spent a  
13 couple minutes on it, the issue of destruction of  
14 documents.

15                  The issue here today is not whether BASF  
16 has reconstructed a record from rocks that people  
17 never looked under to try to build up what was once  
18 destroyed.

19                  One of the issues on crime fraud is was  
20 the evidence destroyed or secreted away with intent?  
21 That's crime fraud.

22                  The whole issue of whether a spoliation  
23 claim survives at trial, that's a whole another  
24 inquiry. And I'm not going to spend a lot of time on  
25 that.

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1                   In fact, I think the Court has actually  
2 invited BASF, if they believe that's the case, to  
3 file a motion for summary judgment. And we'll meet  
4 it.

5                   But the issue here is, for purposes of  
6 crime fraud, was evidence either destroyed or  
7 secreted away that would give rise to the crime fraud  
8 exception? Not whether they've been able to  
9 reconstruct evidence many, many years later, which we  
10 take great issue with. They take great issue with us  
11 on that issue. We take great issue with them.

12                  **SPECIAL MASTER:** I'm surprised by that.

13                  **MR. PLACITELLA:** But you do not need to  
14 get there to make this determination.

15                  **SPECIAL MASTER:** Well, yes and no,  
16 because evidentiary determinations don't exist in a  
17 vacuum. They have to have a context.

18                  And the context for your request for the  
19 application of the exceptions to the attorney/client  
20 privilege is your underlying claim, which is one of  
21 fraudulent concealment.

22                  And fraudulent concealment under New  
23 Jersey law is simply the cause of action for  
24 spoliation. That's all it is. It doesn't mean what  
25 the two words would normally mean in regular

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1 parlane. It means spoliation. And if there's been  
2 no spoliation, then there is no cause of action. And  
3 if there is no cause of action, then there's no basis  
4 for the admissibility of the evidence and therefore  
5 no reason to apply an exception.

6 **MR. PLACITELLA:** Well, your Honor, I  
7 have to tell you that I think that that's a  
8 misreading of the law.

9 I think fraudulent concealment includes  
10 the issue of spoliation in terms of destruction. But  
11 it also includes the issue of having evidence that  
12 you withhold. And that's what happened here.

13 **SPECIAL MASTER:** Well, if you withhold  
14 and don't make it available, you've spoliated it.

15 **MR. PLACITELLA:** Well, that's exactly  
16 right.

17 **SPECIAL MASTER:** Okay. So it's  
18 spoliation by another name.

19 **MR. PLACITELLA:** That's exactly right.

20 **SPECIAL MASTER:** Okay. So we can quote,  
21 you know, Romeo and Juliet about a rose by any other  
22 name, but...

23 **MR. PLACITELLA:** And you have to look at  
24 it at the time that the cause of action existed, not  
25 if they found it after the fraud was exposed. You

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1 have to freeze it in time.

2                   What happened in 1992? What was  
3 available to these plaintiffs? It was spoliated.  
4 The information did not exist. They said it did not  
5 exist.

6                   So we have to also look at who was  
7 involved in the fraud. It was Engelhard, Cahill,  
8 and BASF.

9                   **SPECIAL MASTER:** Well, BASF because it  
10 acquired Engelhard, right?

11                  **MR. PLACITELLA:** Well, BASF because it  
12 not only acquired Engelhard but continued the exact  
13 same conduct after it acquired Engelhard. And I  
14 will demonstrate that to you.

15                  **SPECIAL MASTER:** Remind me, when did  
16 they acquire Engelhard?

17                  **MR. PLACITELLA:** 2006.

18                  **MR. COREN:** June 2006, your Honor, was  
19 the closing.

20                  **MR. PLACITELLA:** And the same thing  
21 occurred all the way up until 2009 when it was  
22 exposed in a New Jersey court. And had it not been  
23 exposed, it would still be going on. And that was  
24 long after BASF took over Engelhard.

25                  So we're going to talk about what

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1 misrepresentations were made. The  
2 misrepresentations, and I think it's significant, did  
3 not start in litigation. And it goes to what the  
4 root of all this was and what the intent was. The  
5 misrepresentations started soon after Engelhard took  
6 over the Johnson mine.

7 **SPECIAL MASTER:** And that occurred when?

8 **MR. PLACITELLA:** In early 1970s.

9 **SPECIAL MASTER:** Okay.

10 **MR. PLACITELLA:** So in 1967 they buy the  
11 mine. From the 1970s into the 1980s, customers are  
12 telling them that they don't want asbestos in their  
13 talc.

14 **SPECIAL MASTER:** Can you go back to the  
15 prior slide?

16 **MR. PLACITELLA:** Sure.

17 **SPECIAL MASTER:** What's the date of that  
18 letter?

19 **MR. PLACITELLA:** 1973.

20 **SPECIAL MASTER:** Okay. It's hard to  
21 tell.

22 **MR. PLACITELLA:** 1973. And there are  
23 numerous examples of this. I just put up a few. I'm  
24 happy to give them all to the Court if the Court  
25 wants it.

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1 **SPECIAL MASTER:** I thought you did.

2                           **MR. PLACITELLA:** Well, there's even more  
3 than that. But we figured we were pressing our luck  
4 with what we gave you.

5                           **SPECIAL MASTER:** That's a kind way of  
6 putting it, yes.

7                           **MR. PLACITELLA:** So customers, whether  
8 they were General Electric, B. F. Goodrich, GAF,  
9 throughout this entire time period, because the  
10 dangers were known and publicized, were telling  
11 Engelhard: We do not want asbestos in this talc. If  
12 you're going to sell it, we don't want it. We'll buy  
13 it from somebody else.

14                                   And Engelhard knew that.     But what did  
15 they say? They told the customers, because they knew  
16 what the demands were, that there is no asbestos in  
17 the talc. Not only did they say there's no asbestos  
18 in the talc, they said there's not even a trace of  
19 asbestos in the talc by the most sophisticated  
20 scientific evidence available.

21 And they told, as I put up on the slide,  
22 entire industries that that was the case in order to  
23 secure that.

24                           In fact, they told the federal  
25 government that. When they filled out their MSDS

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1 sheets, they attached a technical data sheet that  
2 also said to the federal government and anybody who  
3 would buy their product there's no trace of asbestos  
4 in the talc.

5 **MR. FARRELL:** Mr. Placitella, just to  
6 clarify, on that last slide, is that quotation from  
7 the document you're showing there.

8 **MR. PLACITELLA:** That's from what's  
9 attached to the material safety data sheet.

10 **MR. FARRELL:** So it's not from the  
11 document that's on the screen?

12 **MR. PLACITELLA:** It is. It's attached  
13 to material safety data sheet.

14 **MR. FARRELL:** Okay.

15 **MR. PLACITELLA:** Okay. So in the face  
16 of all that, from the early 19 --

17 **SPECIAL MASTER:** Can I just stop you  
18 there for a moment, because according to that prior,  
19 it's supposedly Exhibits 7 and 8, which I'd like to  
20 look at.

21 **MR. COREN:** Is it 8 and 9?

22 **SPECIAL MASTER:** That's what it says --  
23 I'm sorry. 8 and 9. Based on Mr. Farrell's  
24 question, I want to take a little bit of a look at  
25 the material safety data sheet. Okay. That is not

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1      Exhibit 8.

9                   **MR. PLACITELLA:** They're cut off to me  
10                 too.

11                           **MR. FARRELL:** I've looked at the MSDSs  
12 carefully, your Honor, and I don't remember ever  
13 seeing that quotation in the MSDS.

14                           **SPECIAL MASTER:** Do you have these  
15 exhibits handy?

16                           **MR. FARRELL:** We're checking it now  
17 and --

18                           **SPECIAL MASTER:** You're welcome to come  
19 over here and take a look, because I think this  
20 binder weighs more than you do. So it's easier for  
21 you to come here than for me to take it over there.

22                           **MR. FARRELL:** I'll take that as a  
23 compliment, your Honor.

24                           **SPECIAL MASTER:** Here's the MSDS front  
25 and back. And then the next page is this. I can't

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1 foot these --

2 **MR. FARRELL:** They're not sequential.

3 **SPECIAL MASTER:** Well, I don't know if  
4 they are. But the language is in the second  
5 paragraph here.

6 **MR. FARRELL:** That's correct. But I  
7 have not seen a reference to the technical data sheet  
8 as an attachment to the MSDS document.

9 **SPECIAL MASTER:** I will tell you I've  
10 done MSDSs and I've never attached a technical data  
11 sheet to one. But I don't know what other people do.

12 **MR. PLACITELLA:** It's possible, but I'll  
13 check, that I misspoke. But I know for a fact that  
14 what the customers would get would be the MSDS sheet  
15 along with the technical data sheet. Whether it was  
16 actually attached or not, I'll have to double-check  
17 and let you know.

18 **SPECIAL MASTER:** Okay.

19 **MR. FARRELL:** I think the issue, your  
20 Honor, was that Mr. Placitella was saying the  
21 government received the technical data sheet.

22 And the point I was raising is that I  
23 don't believe that language is in the MSDS. And I  
24 don't mean to interrupt his argument.

25 **MR. PLACITELLA:** It's not in the MSDS

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1 sheet itself. Okay. So during this period of  
2 time --

3 **SPECIAL MASTER:** And I did not mean to  
4 be rude --

5 **MR. PLACITELLA:** No, no. It's a fair  
6 point.

7 **SPECIAL MASTER:** -- this is a pretty big  
8 issue and I want to make sure I get it right.

9 **MR. PLACITELLA:** Right. So while the  
10 representations are being made to the customers that  
11 there's not even a trace of asbestos, there are --  
12 and I'm not going to go through all of it, but just  
13 to highlight examples, beginning in 1972 their  
14 insurance carriers are telling them that they find  
15 asbestos.

16 They find it in the waste rock in 1973.  
17 They find it in the air samples in 1977. They find  
18 multiple forms of asbestos in the Emtal talc. They  
19 find tremolite asbestos in 1972.

20 And, again it happens multiple --  
21 again, here's another example in 1977. They find  
22 chrysotile asbestos.

23 It's significant that they start  
24 actually counting the number of fibers. And they're  
25 not finding a few fibers. They're finding millions

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1 of fibers. And this is in the testing documents  
2 that are being generated.

3 And BASF in its papers constantly say:

4 Well, they only found trace amounts.

5 But when you look at the data, that's

6 just not -- that's not factual. What they found  
7 was --

8                           **SPECIAL MASTER:** How do I make that  
9 differentiation? Because all you're pointing out to  
10 me is the quintessential one man's floor is another  
11 man's ceiling.

12 I don't know, nor have I been given the  
13 type of expert information I would need in order to  
14 judge whether X number of fibers per million is a  
15 good thing or a bad thing or --

16                   **MR. PLACITELLA:** And you don't have to  
17 make that judgment. What I'm saying to you is --

25 I will tell you I recently tried a case

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1 where the expert testified at length that it was  
2 highly unlikely that things as alleged by the  
3 plaintiff could be so.

4                   And of course, plaintiff's lawyer  
5 cross-examined this witness, who was a full professor  
6 at Texas Tech and the nation's leading expert on  
7 blood brain barrier matters, and said: Whoa, you  
8 know, you said it was highly unlikely. That doesn't  
9 mean it's impossible.

10                  And she looked at him and said: No good  
11 scientist will ever say that anything is impossible.  
12 But when we say it's highly unlikely, that's really  
13 what it means.

14                  So I don't know what they mean by that.

15                  **MR. PLACITELLA:** Yes. And you're right.  
16 And we're not debating the science.

17                  But what is in the files? The files  
18 don't say trace amounts. They don't say -- the  
19 files say trace to abundant. Right.

20                  They only couched their argument in  
21 terms of trace. The files that were withheld say  
22 trace to abundant.

23                  **SPECIAL MASTER:** But I don't know what  
24 abundant means.

25                  **MR. PLACITELLA:** It means more than

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1 trace. And we have Dr. Hemstock's testimony, who  
2 was the head scientist, explaining what that means.

3 But the point here is not that we need  
4 to engage in a scientific debate at this point.

5 They said there was none, not that there  
6 was trace amounts. They said that there were no  
7 tests --

8 **SPECIAL MASTER:** But that's my point.

9 My point is can they, consistent with the reports  
10 that they have, say, quote, there was none, unquote?

11 **MR. PLACITELLA:** No, they can't.

12 **SPECIAL MASTER:** Okay. That's the  
13 gospel according to Mr. Placitella.

14 **MR. PLACITELLA:** No, your Honor --

15 **SPECIAL MASTER:** Tell me someone else,  
16 some other authority for that?

17 **MR. PLACITELLA:** Their own scientist  
18 when I asked him in a deposition is this a true  
19 statement that there was no testing to show asbestos,  
20 he said no.

21 When the three scientists were  
22 questioned in the Westfall case, they all said they  
23 found asbestos in the talc, not below detection  
24 levels, not some debatable level.

25 The issue is did they have evidence?

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1 They said there was no evidence, not that the  
2 evidence was unreliable, not that the evidence was  
3 sporadic.

4 They made representations to courts and  
5 litigants that there was, one, no asbestos in the  
6 talc, but even more importantly, two, no evidence of  
7 asbestos in the talc.

8 **SPECIAL MASTER:** And I ask you these  
9 questions because -- and I'm presaging what  
10 defendants are going arguing --

11 **MR. PLACITELLA:** Of course.

12 **SPECIAL MASTER:** -- is that they're  
13 basically saying: Our representations were accurate,  
14 you know, within the bubble of things that could be  
15 said.

16 And I hear you to say that no, they were  
17 not accurate because they could never have been  
18 accurate given the facts.

19 **MR. PLACITELLA:** Their representations  
20 could never have been accurate given the facts as  
21 they existed.

22 **SPECIAL MASTER:** Okay.

23 **MR. PLACITELLA:** If they would have  
24 said --

25 **SPECIAL MASTER:** I thought that's what I

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1 said.

2                   **MR. PLACITELLA:** If they would have  
3 said, you know, there are levels that are below  
4 detection but they're there, or there are levels --

5                   **SPECIAL MASTER:** Well, if they're below  
6 detection, how do they know that they're there?

7                   **MR. PLACITELLA:** Well, because it  
8 depends on the method you use.

9                   If they would have said there are levels  
10 but it didn't matter, there weren't health  
11 consequences because they were so low, that might  
12 have been different.

13                  But what they said was there were no  
14 results at all. No results at all. And that was  
15 not true.

16                  **SPECIAL MASTER:** Okay.

17                  **MR. PLACITELLA:** And you can't slice it  
18 any other way. When they say --

19                  **SPECIAL MASTER:** Well, Mr. Assaf is  
20 going to do a real hard effort at slicing it. But  
21 that's for later.

22                  **MR. PLACITELLA:** And it wasn't that it  
23 was just Engelhard who did the tests. They had  
24 outside laboratories. They had two and three  
25 laboratories at a time looking at the same stuff.

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1 And they said: We found asbestos in the talc. And  
2 here they say from trace to abundant.

3 **SPECIAL MASTER:** I still don't know what  
4 that means.

5 **MR. PLACITELLA:** That's okay. In 1979  
6 they had the same samples looked at by three separate  
7 laboratories. And they found asbestos in every  
8 sample.

9 Now, so then we get to -- and we talked  
10 about this a little earlier. One of the significant  
11 misrepresentations in this case, and we'll get there  
12 in a second, is that there was never any evidence of  
13 asbestos in the mine, because if you could convince  
14 somebody that the mine didn't have any asbestos, then  
15 there was no reason to get to the product, because  
16 the product was the product of what came out of the  
17 mine.

18 **SPECIAL MASTER:** There was no other  
19 place where asbestos could come into the  
20 manufacturing process?

21 **MR. PLACITELLA:** Correct, unless they're  
22 going to say it was some contaminant during testing  
23 or something.

24 So what they did is they focused their  
25 affidavits and their efforts to say that there was no

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1       asbestos in the mine.   But they knew that was not  
2       true, because they went to the mine in 1979, the head  
3       researcher, Mr. Gale, and they took samples and they  
4       brought them back.

5                   And what happened was that they wanted  
6       to make sure they had the most sophisticated test  
7       possible. And what they did was they actually sent  
8       them down to Georgia Tech. And then Mr. Gale went to  
9       Georgia Tech to use their equipment to make sure he  
10      had the most sophisticated information. And they  
11      found asbestos in the talc -- in the mine, not in a  
12      production sample, but in the mine itself.

13                  **SPECIAL MASTER:** You mean in the ore  
14      from the mine.

15                  **MR. PLACITELLA:** In the ore. In the  
16      ore.

17                  And it's interesting, because when you  
18      look at -- and the documents tell us, what was the  
19      purpose of the study that they were conducting?

20                  Well, they were actually thinking of at  
21      the time expanding the mining operation, building a  
22      new mill. So they were down there as part of that  
23      process.

24                  **MR. ASSAF:** Excuse me, what slide number  
25      was that?

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1                   **MR. PLACITELLA:** 5/17/79.

2                   **MR. FARRELL:** No, the slide, so I can --

3                   **SPECIAL MASTER:** They normally have a  
4 number on the bottom.

5                   **MR. PLACITELLA:** 47.

6                   **MR. ROTH:** 47.

7                   **MR. FARRELL:** Thank you.

8                   **SPECIAL MASTER:** Okay.

9                   **MR. PLACITELLA:** So when they came back,  
10 Peter Gale, now we know from his transcript, Glenn  
11 Hemstock, Georgia Tech, they all found asbestos in  
12 that ore. They all did.

13                   **SPECIAL MASTER:** You don't mean those  
14 circles to be Venn diagrams, do you?

15                   **MR. PLACITELLA:** There you go.

16                   **SPECIAL MASTER:** Just asking. I don't  
17 want to be literal.

18                   **MR. PLACITELLA:** So then they had a  
19 meeting. It was right after these results came out  
20 in May of '79. And at the meeting they concluded  
21 asbestos fiber is present.

22                   Now, BASF deposed Mr. Swanson, who was  
23 one of the people who worked in the laboratory. And  
24 his daughter developed mesothelioma. We discovered  
25 this at his deposition. I didn't even know it when

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1 I was asking the questions, frankly. BASF asked him  
2 the questions.

3 And he said: Oh, yeah, there's  
4 asbestos -- there was asbestos in that talc.

5 And they said: No, Mr. Swanson, I'm not  
6 talking about the other -- I'm talking about the  
7 talc.

8 He says: No. I know. It was the  
9 talc.

10 How do you know it was the talc?

11 I did -- you know, I was there.

12 And then they asked him: What happened?

13 And he said: Well, once we found the  
14 asbestos in the talc, they closed up the mine, and we  
15 were told to put all of our stuff outside our door  
16 and I never saw it again.

17 And that's what happened.

18 **SPECIAL MASTER:** Put all of our stuff,  
19 what does that mean?

20 **MR. PLACITELLA:** All of our testing  
21 related to the Emtal talc outside of our door. And  
22 it was picked up and we never saw the testing again.

23 **SPECIAL MASTER:** Was that part of the  
24 March --

25 **MR. PLACITELLA:** Correct.

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1                   **SPECIAL MASTER:** -- 7, 1984, document  
2 retention and destruction memorandum? Right. And  
3 it's interesting because --

4                   **SPECIAL MASTER:** The one you call the  
5 purge memo?

6                   **MR. PLACITELLA:** Yeah.

7                   **SPECIAL MASTER:** I like that name. It  
8 may not be accurate, but it's catchy.

9                   **MR. PLACITELLA:** It's interesting that  
10 when Mr. Swanson was asked questions, he did not know  
11 the exact date of the memo he got, but he  
12 recounted -- he said: I had a memo after we found  
13 the asbestos, and the memo told us what to do with  
14 the evidence. And I believe that the memo was sent  
15 by my boss, Glenn Hemstock, but it was authored by  
16 the legal department.

17                  And it turns out he was pretty darn  
18 accurate that it was sent by his boss. And his boss  
19 actually testified under oath that it was authored by  
20 the legal department.

21                  **SPECIAL MASTER:** Was this the deposition  
22 that was taken back in the 80s --

23                  **MR. PLACITELLA:** No.

24                  **SPECIAL MASTER:** -- or is this the  
25 deposition more recently taken where Mr. Hemstock

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1 himself was in his 80s --

2 **MR. PLACITELLA:** Correct.

3 **SPECIAL MASTER:** -- and at an assisted  
4 living facility?

5 **MR. PLACITELLA:** No, he wasn't at an  
6 assisted living facility. He was at a hotel being  
7 represented.

8 **SPECIAL MASTER:** He wasn't living in a  
9 hotel, was he?

10 **MR. PLACITELLA:** No, your Honor.

11 **SPECIAL MASTER:** Where was he living?

12 **MR. PLACITELLA:** He was living with his  
13 wife.

14 **SPECIAL MASTER:** In an assisted living  
15 facility, correct?

16 **MR. PLACITELLA:** His health was fine.  
17 His wife's health was compromised.

18 **MR. ASSAF:** You are correct, your Honor.

19 **MR. PLACITELLA:** His health --

20 **SPECIAL MASTER:** I did read everything.

21 **MR. PLACITELLA:** He was living --  
22 because his wife needed extra care. His health was  
23 fine.

24 **SPECIAL MASTER:** Okay.

25 **MR. PLACITELLA:** And if you look at his

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1 videotape, you will see that he was pretty spry. He  
2 was very well under control.

3 **SPECIAL MASTER:** I should look that  
4 good. But I'd rather keep my hair too.

5 **MR. PLACITELLA:** Yeah. We went through  
6 with him all the testing. And we actually asked him,  
7 because he knows what the testing was, and we went  
8 through each document. We said: Okay, was this  
9 reliable? Did you rely upon this? Was this  
10 reliable? Was it unreliable? We actually asked him  
11 to put it in three columns, positive, negative, and  
12 tests that he thought there were problems with.

13 They say he was pressured. So I went  
14 back and I asked him questions. And I cited to the  
15 transcript. When you went through all these tests,  
16 and I went through every one all over again, did you  
17 feel pressure?

18 And you can look at his videotape if you  
19 so choose.

20 And he said: No, you know, I'm good  
21 with what I testified with.

22 And I asked him: What did you mean --  
23 what did it mean by trace? What did that mean?

24 And he said: Well, trace was in the  
25 order of a couple of percent or so.

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1                   So then I asked him: Well, what does  
2                   that mean in the real world if it's just trace?  
3                   Forget abundant. If it's just trace, what does that  
4                   mean in the real world? And I said: So, for  
5                   example, you know, given the amount of Emtal talc  
6                   that was sold to the Congoleum plant in Trenton, what  
7                   did that mean?

8                   And he said: Well, you know, and I --  
9                   using the two percent, it was about 1,000,800 pounds  
10                  of asbestos over three years inside the talc.

11                  **SPECIAL MASTER:** So if the asbestos was  
12                  one percent of the talc that was being sent out?

13                  **MR. PLACITELLA:** It would be half of  
14                  that.

15                  **SPECIAL MASTER:** I'm sorry?

16                  **MR. PLACITELLA:** Then it would have been  
17                  300,000 pounds.

18                  **SPECIAL MASTER:** So he used --

19                  **MR. PLACITELLA:** He used two percent --

20                  **SPECIAL MASTER:** He used two percent.

21                  **MR. PLACITELLA:** -- as a trace.

22                  **SPECIAL MASTER:** Okay.

23                  **MR. PLACITELLA:** And then he took the  
24                  total poundage -- and I walked through him through  
25                  this --

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1                           **SPECIAL MASTER:** Of the talc actually  
2 sold to Congoleum?

3                           **MR. PLACITELLA:** Correct.

4                           **SPECIAL MASTER:** And it's just simple  
5 arithmetic.

6                           **MR. PLACITELLA:** Exactly right. Now, to  
7 be fair, I walked him through the calculations. But  
8 that's where we got -- just to give it context --

9                           **SPECIAL MASTER:** Take it back again.  
10 What's the relevance of the red box?

11                          **MR. PLACITELLA:** That's just the math.  
12 He said it was 1,800 pounds over three years.

13                          **SPECIAL MASTER:** It's one million eight.

14                          **MR. PLACITELLA:** Right, a million eight  
15 over three years. So one year would have been  
16 600,000.

17                          **SPECIAL MASTER:** Well, there's a  
18 difference between 600,000 pounds of asbestos and  
19 600,000 pounds of asbestiform material.

20                          **MR. PLACITELLA:** No.

21                          **SPECIAL MASTER:** No?

22                          **MR. PLACITELLA:** There's a difference --

23                          **SPECIAL MASTER:** The words have meaning.

24                          **MR. PLACITELLA:** There's a -- I'm not  
25 sure I'm getting --

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1                           **SPECIAL MASTER:** Asbestos is one thing.

2                           Asbestiform is something else.

3                           **MR. PLACITELLA:** I don't think that  
4                           that's an accurate description of the science.

5                           **SPECIAL MASTER:** Okay.

6                           **MR. PLACITELLA:** But we don't have to --

7                           **SPECIAL MASTER:** Yeah, we do. But  
8                           that's all right.

9                           **MR. PLACITELLA:** Okay. So what happens  
10                          in the face of all this information? A lawsuit is  
11                          filed by Mr. Westfall. And Engelhard is not  
12                          originally in the case. They're joined later. But a  
13                          lawsuit is filed in October of 1982. Significantly,  
14                          at the same time --

15                          **SPECIAL MASTER:** And this is the one in  
16                          Rhode Island?

17                          **MR. PLACITELLA:** Correct.

18                          Significantly, at the same time there's -- or close  
19                          in time there's another lawsuit filed in California  
20                          called the Schwartz case. And the significance of  
21                          that will become evident in a couple minutes.

22                          In March of '83 Dr. Hemstock testifies  
23                          that there were tests showing from trace to abundant  
24                          fibers of asbestos in the talc depending on the test  
25                          that you looked at. In April of --

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1                           **SPECIAL MASTER:** Don't go too far,  
2 because there's a little bit of confusion in respect  
3 of that.

4                           I thought in your brief you referred to  
5 the Hemstock deposition as Exhibit 3. And it's  
6 actually Exhibit 4.

7                           **MR. PLACITELLA:** Oh.

8                           **SPECIAL MASTER:** I just want to make  
9 sure that we're clear on that record. It was in a  
10 footnote, if memory serves me. Oh, actually it's  
11 footnote 4 of your brief where you refer to Exhibit 4  
12 as the, quote, Cahill compilation.

13                          **MR. PLACITELLA:** That's different.

14                          **SPECIAL MASTER:** And in fact, Exhibit 4  
15 is the continued deposition of Glenn Hemstock.

16                          **MR. PLACITELLA:** Right. The Cahill  
17 compilation is different.

18                          **SPECIAL MASTER:** Okay. I thought so.

19                          **MR. PLACITELLA:** That's Exhibit 3.

20                          **SPECIAL MASTER:** And we're all going to  
21 blame your son for this mistake. You get a pass on  
22 that one.

23                          **MR. PLACITELLA:** So first Dr. Hemstock  
24 says that the testing showed trace to abundant  
25 asbestos, depending on the tests that were done and

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1 when. Dr. Triglia verifies. Dr. Gale we know  
2 now --

3                           **SPECIAL MASTER:** It's not Dr. Gale, it's  
4 just Mr. Gale, correct?

5                           **MR. PLACITELLA:** Mr. Gale. He also  
6 says that they found chrysotile fibers. So you have  
7 three different scientists all testifying. Then the  
8 Westfall case settles.

**SPECIAL MASTER:** They do that.

10                           **MR. PLACITELLA:** Right. Good for Mr.  
11 Westfall.

12 So what happens? As a condition of  
13 settlement, all of the information that was  
14 accumulated during the case gets turned back over to  
15 Engelhard.

**SPECIAL MASTER:** That's not unusual.

17 MR. PLACITELLA: It's not unusual --

**SPECIAL MASTER:** It's not unusual.

19                           **MR. PLACITELLA:** -- it's kind of unusual  
20        that the depositions get turned back over. But it  
21        does happen. And it happened in this case.

22                           **SPECIAL MASTER:** I will tell you it  
23 happens in pretty much every case I handle. So  
24 that's not unusual to me.

25 MR. PLACITELLA: All right. So what

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1 happened? What's turned back over? What's turned  
2 back over is all of the scientific testing, all of  
3 the depositions, all of the exhibits to the  
4 depositions, and more than that, all of the evidence  
5 that the plaintiff had amassed independently, which  
6 is unusual.

7 So for example, they had a Dr. Glassley,  
8 who was a geologist. They hired him. Dr. Glassley  
9 went up to the mine.

10 **SPECIAL MASTER:** You mean Westfall did?

11                           **MR. PLACITELLA:** Correct. Dr. Glassley  
12 went up to the mine. Dr. Glassley, because he  
13 couldn't get into the mine itself, took samples right  
14 out on the side of the mine, the waste samples, and  
15 he did testing. And he was prepared to testify that  
16 he found chrysotile asbestos in that mine.

17 And what he did is he had scientific  
18 data. He took photographs under the microscope. He  
19 took notes. He had samples. That Westfall was  
20 forced to turn over to Engelhard.

21                           **SPECIAL MASTER:** Well, he wasn't forced  
22 to turn over. He agreed to turn it over as part his  
23 settlement. Nobody put a gun to his head, did they?

24 MR. PLACITELLA: Well, okay.

25 **SPECIAL MASTER:** He had the option to

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1 say no.

2                   **MR. PLACITELLA:** He did have the option  
3 to say no.

4                   **SPECIAL MASTER:** Okay.

5                   **MR. PLACITELLA:** So what happened to Dr.  
6 Glassley's material? Right. Dr. Glassley's  
7 evidence was destroyed. Right. It wasn't preserved  
8 at this point in time. They destroyed his samples.  
9 They destroyed his notes. They destroyed all of his  
10 findings.

11                  **SPECIAL MASTER:** How do we know that?

12                  **MR. PLACITELLA:** Because they admitted  
13 it in their request for admissions. And we know  
14 that they did that. And that's not usual. Okay.

15                  And the only thing that Dr. Glassley  
16 kept was he had a field notebook and some notes of  
17 his own because it pertained to other work that he  
18 did.

19                  But the work that he turned over to  
20 Westfall was destroyed.

21                  **SPECIAL MASTER:** Pursuant to a  
22 stipulation.

23                  **MR. PLACITELLA:** Pursuant to their  
24 agreement. Now, that becomes material because that  
25 same evidence in some other form surfaces 20 years

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1      later. And we'll talk about that in a little bit.

2      It becomes significant in terms of what happens here.

3      So some months later --

4                   **SPECIAL MASTER:** I'm looking at my watch  
5 because you told me --

6                   **MR. PLACITELLA:** I know that.

7                   **SPECIAL MASTER:** -- you have a hard stop  
8 at 3:30.

9                   **MR. PLACITELLA:** I'm going to try move  
10 through this quickly now.

11                  **SPECIAL MASTER:** Okay. And I apologize  
12 if I'm eating up your time.

13                  **MR. PLACITELLA:** That's okay. Some  
14 months later -- it settles in the fall. And some  
15 months later the purge memo is sent out over Dr.  
16 Hemstock's name. And that purge memo, calling for  
17 they say the return of the information, that whole  
18 process is going on and the Glassley evidence is  
19 destroyed. It's material evidence. It shows  
20 asbestos in the mine. That all is going on while the  
21 Schwartz case is still pending.

22                  So the process of gathering up the  
23 evidence, the process of destroying the Glassley  
24 samples and the Glassley notes, that all is happening  
25 while there's another case pending in California.

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1                           **SPECIAL MASTER:** To be fair with you,  
2 because you are talking about the purge memo, I don't  
3 read it the way you do. I just want you to know  
4 that.

5                           What I find most telling about the purge  
6 memo, and I'm using that term because that's what you  
7 called it, is the last full sentence in the substance  
8 of it, which says: Please understand that it is our  
9 intent to retain copies of those documents to be  
10 preserved from discontinued operations only in our  
11 central files and can be accessed there should the  
12 need arise.

13                          **MR. PLACITELLA:** Yes, that's what it  
14 says. I absolutely agree. That's not what happened  
15 though.

16                          **SPECIAL MASTER:** Well, but it's not a  
17 purge memo. It is a document retention memo. And  
18 no different than what any number of companies were  
19 doing in the early 1980s when all of a sudden there  
20 was this explosion of information and you simply  
21 couldn't keep the information any longer. Everybody  
22 started adopting document retention and destruction  
23 policies.

24                          **MR. PLACITELLA:** I understand. But what  
25 we'll demonstrate to you happened -- and by the way,

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1       this only proves the point about fraudulent  
2       representation, because by their own memo they gather  
3       all of the information in one place.

4                   So even if that's true, and we don't  
5       believe it was true, because we'll -- and I'll show  
6       you why. But even if that was true and that's what  
7       they did, that only proves that they had the evidence  
8       in their possession at a time when they were making  
9       representations that the evidence did not exist.

10                  So the purge memo is sent. Dr.  
11       Hemstock testifies in the Samson case that it went  
12       out under his name but it was authored by Mr.  
13       Dornbusch.

14                  So now the Schwartz case settles in  
15       July. And then some time passes. And then  
16       litigation starts anew.

17                  And one of the things that happens --  
18       and I'm not going to go into this in great detail  
19       because you've read it. I just want to put some  
20       things in context.

21                  They hire -- they get together with  
22       Johnson & Johnson and they construct this affidavit.  
23       And the affidavit says, one, there's no asbestos in  
24       Vermont, which we know is not true, but that the  
25       Johnson mine itself is free from contamination by

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1 asbestos.

2 And what's significant here is that --

3 **SPECIAL MASTER:** And that affidavit was  
4 submitted in which case?

5 **MR. PLACITELLA:** It was submitted in  
6 hundreds, if not thousands of cases over and over and  
7 over.

8 And what's significant in that  
9 affidavit, and they do cite two articles that --

10 **SPECIAL MASTER:** Just so that I know,  
11 your referring to the Ashton affidavit?

12 **MR. PLACITELLA:** Correct. The Ashton  
13 affidavit contains of a number of things. It  
14 contains published articles that do draw the  
15 conclusion that there was no asbestos in the mine.

16 If you look at -- we don't really have  
17 to go there, but if you actually look at the  
18 articles, you see the sampling that was done was done  
19 in the 40s and 50s when they're at a different level.  
20 But we don't have to go there.

21 But one of the significant pieces of the  
22 affidavit is they attach as proof that there was no  
23 asbestos in the mine the deposition testimony of Mr.  
24 Chidester, who was their expert in the Westfall case.

25 So they clearly, both Johnson & Johnson

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1 and Engelhard, are referencing the Westfall case and  
2 they're attaching sworn testimony from the Westfall  
3 case.

4                   **SPECIAL MASTER:** They're referencing Dr.  
5 Chidester's testimony --

6                   **MR. PLACITELLA:** Correct.

7                   **SPECIAL MASTER:** -- that could have been  
8 given in any case.

9                   **MR. PLACITELLA:** No, your Honor. They  
10 attached the Westfall transcript.

11                  **SPECIAL MASTER:** I understand that. But  
12 it could have been in any case. I don't think that  
13 the plaintiff would have made any difference to what  
14 Dr. Chidester said, would it?

15                  **MR. PLACITELLA:** No, that's not my  
16 point. My point is that they took the testimony from  
17 the Westfall case for Chidester knowing full well  
18 that their own scientists provided testimony that was  
19 exactly the opposite. And that was not part of the  
20 affidavit.

21                  If the affidavit was going to be  
22 truthful, it would have said: This is my opinion,  
23 this is what Dr. Chidester said, and, oh, by the way,  
24 there were tests but they were either unreliable or  
25 they only showed trace, and by the way, our own

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1 expert -- our own scientists also testified and you  
2 should look at that and then you make your  
3 determination what you're going do with that  
4 information.

5 They didn't do that. They knew it was  
6 there.

7 **SPECIAL MASTER:** Wouldn't they have been  
8 entitled to decide what they wanted to rely upon on  
9 the basis of credibility? Maybe they thought Dr.  
10 Chidester was more credible than their own people. I  
11 don't know that.

12 **MR. PLACITELLA:** Well, they used Dr.  
13 Ashton's affidavit to say there was no evidence. It  
14 did not contain asbestos. That just wasn't true.  
15 At most it was misleading.

16 In fact, I asked Dr. -- and I'll show  
17 you the testimony. I asked Dr. Hemstock himself  
18 whether the affidavit was truthful. He said no.

19 **SPECIAL MASTER:** Well, of course he's  
20 going to say no. At least that's consistent with  
21 what he had said before. Whether it's right or not  
22 is a different story. But it is consistent.

23 **MR. PLACITELLA:** Then in order to  
24 buttress that claim, they go to Mr. Carter. And  
25 they have Mr. Carter execute an affidavit. And they

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1 have Mr. Carter kind of seal the deal.

2                   While Mr. Dr. Ashton talks about his  
3 opinions, Mr. Carter then comes forward and says:  
4 And there is nothing else to look at. Right. We  
5 don't have any other testing data. That's his  
6 affidavit.

7                   Now, if you take the purge memo at its  
8 face, of course they had the data. If you take the  
9 Cahill compilation which they found in Mr.  
10 Dornbusch's own personal file, of course they had the  
11 data.

12                  But they had Mr. Carter execute an  
13 affidavit saying that they don't have any testing  
14 data.

15                  So they used both the Carter affidavit  
16 and the Dornbusch affidavit in conjunction the Ashton  
17 affidavit together to convince claimants, courts, and  
18 litigants that there was no merit to them going  
19 forward with their case.

20                  And we put in our brief a few examples  
21 of the letters that were sent. We can give you all  
22 the examples if you really want to see them. There  
23 are many, many, many examples.

24                  **SPECIAL MASTER:** Do I look like I want  
25 you to give me more paper?

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1                   **MR. PLACITELLA:** No.

2                   **SPECIAL MASTER:** Okay.

3                   **MR. PLACITELLA:** They did it in  
4 virtually every state from Michigan to Arkansas to  
5 Massachusetts. They did it to me. In 2009 they  
6 sent us the same letter and they threatened us with  
7 sanctions.

8                   **SPECIAL MASTER:** Well, did they do it to  
9 you or to your wife?

10                  **MR. PLACITELLA:** Well, to my wife. But  
11 I always take the brunt of it.

12                  **SPECIAL MASTER:** Well, as it should be.

13                  **MR. PLACITELLA:** As it should be.

14                  **SPECIAL MASTER:** But I recall reading  
15 that letter. And it was not addressed to you.

16                  **MR. PLACITELLA:** Right. It was  
17 addressed to her. But in my house we're the same.  
18 So I'm saying that on the record for points.

19                  **SPECIAL MASTER:** No, I'm going to use  
20 that to blackmail you, because in my house my wife  
21 and I are not the same.

22                  **MR. PLACITELLA:** So this is 2009, three  
23 years after BASF takes over Engelhard.

24                  And they didn't just put it in letters,  
25 your Honor. They put it in sworn answers to

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1 interrogatories. They did it in the Chernick case,  
2 which is a representative of the plaintiffs in this  
3 case. In the Chernick case, not only did they say  
4 that there was no asbestos in the talc, they said  
5 nobody ever testified, there was no prior testimony.  
6 That was just not true.

7                   **SPECIAL MASTER:** Correct me if I'm  
8 wrong, the Chernick case in New York is still going  
9 on?

10                  **MR. PLACITELLA:** Correct. But Engelhard  
11 is out of it -- or BASF is out of it.

12                  **SPECIAL MASTER:** How is BASF out of it?

13                  **MR. PLACITELLA:** They were dismissed  
14 under the representation -- they filed a motion for  
15 summary judgment and it was not opposed. In the  
16 motion for summary judgment they said there was no  
17 asbestos in the talc.

18                  **MR. FARRELL:** And then withdrawn.

19                  **SPECIAL MASTER:** Have you filed a motion  
20 to vacate the summary judgment?

21                  **MR. FARRELL:** I do not represent Mrs.  
22 Chernick in that case. I represent Mrs. Chernick in  
23 this case, in the fraudulent concealment case.

24                  **SPECIAL MASTER:** Are you in  
25 communication with her counsel in that case?

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1                   **MR. PLACITELLA:** Yes, I am.

2                   **SPECIAL MASTER:** What's the status of  
3 the claim against BASF? Has it been reinstated?

4                   **MR. PLACITELLA:** To my knowledge no.

5 To my knowledge no.

6                   **SPECIAL MASTER:** I'm sure you'll tell  
7 me. You'll write it on one of your little note  
8 pieces and you'll tell me.

9                   **MR. PLACITELLA:** Somebody told me they  
10 thought the case was stayed. But we can check and  
11 let you know.

12                  **SPECIAL MASTER:** Okay. Mr. Assaf is  
13 going to have a coronary if I don't let him speak,  
14 so....

15                  **MR. ASSAF:** I was going to say I think  
16 Mr. Placitella was mistaken. It is stayed. I can  
17 get --

18                  **SPECIAL MASTER:** The case against BASF  
19 is stayed or the entire the case?

20                  **MR. ASSAF:** The insurance case is still  
21 pending in New York and it is stayed.

22                  **SPECIAL MASTER:** What's the status of  
23 BASF in that case as stayed?

24                  **MR. ASSAF:** We're --

25                  **SPECIAL MASTER:** Are you still a party

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1 defendant?

2 **MR. ASSAF:** Still a party defendant.

3 **SPECIAL MASTER:** So you have not been  
4 dismissed?

5 **MR. ASSAF:** Not to my knowledge, your  
6 Honor. And I'll check that. If I'm wrong, I'll  
7 confirm with you on Monday. But to my knowledge  
8 we're still in it. Every once in a while we receive  
9 a communication from the Court.

10 **SPECIAL MASTER:** Okay.

11 **MR. PLACITELLA:** They filed  
12 interrogatory responses in the federal MDL saying the  
13 same thing.

14 **SPECIAL MASTER:** That's the one before  
15 Judge Weiner?

16 **MR. PLACITELLA:** Correct. And that  
17 applied to every federal case across the United  
18 States.

19 They filed the same interrogatory  
20 answers or similar citing the Ashton affidavit in the  
21 Graham case here. They filed it in the Ohio  
22 interrogatory cases. There's a general set of  
23 interrogatories in Ohio. And they --

24 **SPECIAL MASTER:** And that's five of the  
25 six representative plaintiffs in this case?

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1                           **MR. PLACITELLA:** Correct. And then  
2 they made the representations not only to the  
3 litigants but to the Courts. They wrote a letter to  
4 Judge Weiner representing that there was no asbestos  
5 in the talc, citing to the Ashton affidavit.

6                           **MR. FARRELL:** Can you go back, please?

7                           **MR. PLACITELLA:** Sure.

8                           **MR. FARRELL:** Thank you.

9                           **MR. PLACITELLA:** Okay. There were  
10 summary judgment motions filed in Ohio making the  
11 representation. There was a summary judgment motion  
12 filed in the Graham case making the representation.  
13 There were summary judgment motions filed in  
14 Massachusetts making the representation.

15                           And then I asked the witnesses in  
16 deposition. I said, for example to Dr. Hemstock,  
17 when I asked him about the Ashton affidavit: From  
18 everything you know, is that accurate?

19                           He said no.

20                           I asked their corporate representative,  
21 Ellen Poole, about the Ashton affidavit: Based on  
22 everything that we've gone through and all the tests  
23 you're aware of, is that a true statement?

24                           And she said: No, there were tests that  
25 showed there was asbestos.

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1                           **SPECIAL MASTER:** She didn't say no. She  
2        said there were tests that showed, right?

3                           **MR. PLACITELLA:** There were tests that  
4        showed there was contamination by asbestos. That's  
5        what it says.

6                           When I asked him about the Carter  
7        affidavit, Dr. Hemstock, he said -- I asked him: Is  
8        that a true statement?

9                           And he said: I don't know what was in  
10       Mr. Carter's mind at the time, but it appears not to  
11       be true on the surface of it, on the face of it.

12                          And then there are numerous admissions  
13       by Engelhard and BASF that the lies they told  
14       actually worked.

15                          And we have some examples. I didn't  
16       want to overburden the Court with all of the  
17       examples. If you want them, we'll supply them to you  
18       for a complete record.

19                          But there are many, many statements by  
20       counsel that clearly state that all the cases in this  
21       state were dismissed because of our representation,  
22       all the cases in that state were dismissed based on  
23       that representation.

24                          They did it to Mr. Bevan. There's  
25       actually testimony where they admit Mr. Bevan

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1 dismissed his cases based upon that representation.

2 They actually went so far in one Ohio  
3 case to say, when they were trying to convince the  
4 lawyer to dismiss his cases, he said: Look, what are  
5 you doing? Virtually everybody else who we've told  
6 this to has dismissed their cases. And --

7 **SPECIAL MASTER:** Before you go any  
8 further, Mr. Placitella, a couple of times you've  
9 said there's more that we could submit to you.

10 **MR. PLACITELLA:** Right.

11 **SPECIAL MASTER:** And I rather tongue in  
12 cheek said: Do I look like I need more paper from  
13 you?

14 Actually that's not the standard. The  
15 standard is you should submit whatever you think you  
16 need to submit to advance your cause. As you know, I  
17 will review everything that you submit. It's a  
18 little late in the day to be doing that.

19 **MR. PLACITELLA:** Right.

20 **SPECIAL MASTER:** And if you do, it's  
21 going to trigger an opportunity by BASF to respond.

22 **MR. PLACITELLA:** I understand.

23 **SPECIAL MASTER:** So bear that in mind.  
24 Well, actually BASF and Cahill, because they both  
25 opposed your application.

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1                           **MR. PLACITELLA:** Well, we put a lot in  
2 the record, your Honor. We believe you can make it  
3 based on what we've given you. We tried to be  
4 judicious in how much we were going to give you, but  
5 there's a lot more where that came from. And I'm  
6 making that representation because I've read it. I  
7 asked the representative for BASF, the corporate  
8 representative --

9                           **SPECIAL MASTER:** What is Miss Poole's  
10 position with BASF?

11                          **MR. PLACITELLA:** She was the corporate  
12 representative.

13                          **SPECIAL MASTER:** I know she appeared at  
14 a deposition as a 30(b)(6) deponent.

15                          **MR. PLACITELLA:** She no longer works for  
16 them.

17                          **SPECIAL MASTER:** What was her position  
18 at BASF?

19                          **MR. PLACITELLA:** She no longer works for  
20 them. As I understand it, she works -- she's not  
21 with them anymore.

22                          **SPECIAL MASTER:** At the time that her  
23 deposition was taken --

24                          **MR. PLACITELLA:** I think she worked in  
25 the accounting department.

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1                           **SPECIAL MASTER:** Okay. So she was not  
2 a lawyer?

3                           **MR. PLACITELLA:** Correct.

4                           **SPECIAL MASTER:** But she was designated  
5 by BASF as their 30(b)(6) representative?

6                           **MR. PLACITELLA:** That's correct.

7                           **SPECIAL MASTER:** Okay. So her knowledge  
8 would be on the accounting side. She's not a  
9 scientist.

10                          **MR. PLACITELLA:** Right. Her personal  
11 knowledge, that's correct.

12                          And so we went through the documents and  
13 she admitted that, you know, those were the  
14 representations. And based on those representations,  
15 cases were dismissed all over the United States.

16                          **SPECIAL MASTER:** And that's you showing  
17 her documents and asking her: Is this what it says  
18 and what was the result of it?

19                          **MR. PLACITELLA:** Correct. So then what  
20 happens, in 2004 to 2006 there's another case filed  
21 in Rhode Island. It's called the Martin case. And  
22 in the Martin case somehow the plaintiff's lawyer  
23 found out about the Westfall case.

24                          Maybe they knew each other from town.  
25 Who knows? We'll find out.

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1                           **SPECIAL MASTER:** Rhode Island is a small  
2 place.

3                           **MR. PLACITELLA:** Rhode Island is a small  
4 place. And I think the offices aren't far away from  
5 each other.

6                           So what happens is that the lawyer,  
7 Elizabeth Quizone (phonetic), tracks down Mr.  
8 Glassley and she hires Dr. Glassley. And somehow she  
9 gets her hands on some of the Hemstock -- I'm sorry,  
10 some of the Westfall --

11                          **SPECIAL MASTER:** Westfall.

12                          **MR. PLACITELLA:** -- evidence. And he  
13 has some other notes of his own I believe.

14                          So they piece things together with  
15 what's left. And Glassley is going to testify about  
16 what he found when he went there.

17                          And it's documented in answers to  
18 interrogatories. And his deposition was actually  
19 taken in a New Jersey state court case. And he says:  
20 If I was asked in the Martin case, I would have  
21 testified that there was asbestos in the talc.

22                          **SPECIAL MASTER:** What happened to the  
23 Martin case that he didn't testify?

24                          **MR. PLACITELLA:** The Martin case -- once  
25 Dr. Glassley surfaced, the Martin case was settled.

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1                   But the interesting thing about the  
2    Martin case was that now the whole issue of the  
3    Westfall case resurfaces.

4                   And you can even look on the privilege  
5    log where there's references to the Westfall case  
6    during the time that the Martin case is pending.   So  
7    the whole issue --

8                   **SPECIAL MASTER:** Help me foot this to  
9    the information you provided. I don't recall seeing  
10   anything in respect to the Martin case in your  
11   submissions. Am I missing something?

12                  **MR. PLACITELLA:** Appendix E Jared says.

13                  **SPECIAL MASTER:** So the 44 page  
14   spoliation appendix.

15                  **MR. JARED PLACITELLA:** Yes, your Honor.

16                  **SPECIAL MASTER:** No wonder I don't  
17   remember it.

18                  **MR. PLACITELLA:** So what happens here is  
19   that the case is settled. And what happened in  
20   Martin is Dr. Glassley actually authored a report and  
21   that was -- and as a condition of settlement that  
22   report was turned back over to Engelhard and to  
23   Cahill Gordon.

24                  **SPECIAL MASTER:** Well, by this point  
25   isn't it BASF?

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1                   **MR. PLACITELLA:** I think BASF is right  
2 in the crevice. I don't think it's BASF quite yet.

3                   **SPECIAL MASTER:** Okay.

4                   **MR. PLACITELLA:** If I get the timing  
5 right.

6                   **SPECIAL MASTER:** Well, BASF acquired  
7 Engelhard in 2006.

8                   **MR. PLACITELLA:** 2006. But I think --  
9 I'm not positive on that issue.

10                  But what's significant here is that the  
11 actual report now is in issue.

12                  **SPECIAL MASTER:** Apparently somebody has  
13 it, because --

14                  **MR. PLACITELLA:** Well, what happened to  
15 it? What happened was BASF and Cahill Gordon put it  
16 on their privilege log.

17                  So they took the plaintiff's expert  
18 report that found asbestos in the talc that had  
19 resurfaced in the Martin case, and then they put it  
20 on their privilege log and they called it work  
21 product. And they described it on their privilege  
22 log as summary of activities related to services  
23 rendered. Now, we only know that from everything  
24 that's transpired.

25                  No plaintiff's lawyer or anybody else

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1 who got that privilege log was ever going to know  
2 that summary of related services rendered was  
3 actually a plaintiff's expert report.

4                   **SPECIAL MASTER:** How did you know it?

5 How did you know it?

6                   **MR. PLACITELLA:** I eventually found out.

7                   **SPECIAL MASTER:** How?

8                   **MR. JARED PLACITELLA:** We got the  
9 report.

10                  **MR. PLACITELLA:** We eventually -- we now  
11 have the report.

12                  **SPECIAL MASTER:** Okay. How?

13                  **MR. PLACITELLA:** They de-privileged it  
14 after a battle.

15                  **SPECIAL MASTER:** Okay.

16                  **MR. PLACITELLA:** I don't want to say  
17 more than that. It was de-privileged at some point  
18 in time.

19                  **SPECIAL MASTER:** You mean it was --

20                  **MR. PLACITELLA:** In 2009 --

21                  **SPECIAL MASTER:** -- taken off the  
22 privilege list by BASF --

23                  **MR. PLACITELLA:** Correct.

24                  **SPECIAL MASTER:** -- and handed to you?

25                  **MR. PLACITELLA:** Correct.

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1                           **SPECIAL MASTER:** Okay.

2                           **MR. PLACITELLA:** All right. That was  
3 post-2009. So between 2006 up until the Paduano  
4 case, even though they had a report from the  
5 plaintiff's expert saying there was asbestos in the  
6 talc, people were still being told there was no  
7 evidence of asbestos in the talc. People were still  
8 being told it appeared on a privilege log.

9                           They had no right to put that on a  
10 privilege log as their work product. That wasn't  
11 described accurately.

12                          **SPECIAL MASTER:** But you got it. And  
13 you did get it before March of 2011.

14                          **MR. PLACITELLA:** We got it.

15                          **SPECIAL MASTER:** Before March of 2011.

16                          **MR. PLACITELLA:** Yes. But in terms of  
17 fraud, this clearly demonstrates from our perspective  
18 ongoing fraud. They had it. It was there. It  
19 came up. They settled the case. They buried the  
20 evidence and they put it on the privilege log. And  
21 they put it on the privilege log so no one would ever  
22 figure it out. And no one did figure it out.

23                          **SPECIAL MASTER:** How did you figure it  
24 out?

25                          **MR. FARRELL:** Would you like me to speak

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1 to that?

2                   **MR. PLACITELLA:** I'm concerned about how  
3 much I'm allowed to say.

4                   **MR. FARRELL:** I'd be happy to address  
5 it, your Honor, because I don't think that --

6                   **SPECIAL MASTER:** Mr. Farrell, I'm dying  
7 to hear this answer.

8                   **MR. FARRELL:** Thank you, your Honor.

9                   The privilege log that Mr. Placitella is  
10 showing you is a privilege log that was created in  
11 the Paduano case after the Littleton Joyce law firm  
12 went through the files of Cahill Gordon to try to  
13 identify documents that were responsive to the  
14 fraudulent concealment discovery Mr. Placitella was  
15 taking in that case.

16                  They found in Cahill Gordon's files a  
17 copy of a document titled summary of activities  
18 related to a case, which they initially thought was a  
19 consulting expert or draft report prepared by an  
20 expert for the defense. So they put it on the  
21 privilege log believing it was a defense privileged  
22 item. Once we learned --

23                  **SPECIAL MASTER:** Let me stop you right  
24 there. The title of the document is exactly the  
25 language that appears in the privilege log?

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1 Can you put that back up, please?

2 **MR. FARRELL:** It's longer than that.

3 **MR. PLACITELLA:** That's the document.

4 **SPECIAL MASTER:** Well, can you put up  
5 the privilege log, please?

6 The language that it says there, summary  
7 of activities related to services rendered, does that  
8 come from the title of the document itself?

9 **MR. FARRELL:** I believe so, yes.

10 **MR. PLACITELLA:** Here's the title, your  
11 Honor.

12 **SPECIAL MASTER:** Well, I can't read  
13 that.

14 **MR. PLACITELLA:** I'll read it to you.

15 **SPECIAL MASTER:** Okay.

16 **MR. PLACITELLA:** Summary of activities  
17 related to services rendered for Decof & Grimm in the  
18 case of David L. Westfall versus Whittaker, Clark &  
19 Daniels.

20 Anybody who would see Decof & Grimm,  
21 they would come to a different conclusion. That was  
22 left out.

23 **SPECIAL MASTER:** Only if they know who  
24 Decof & Grimm are. And I don't.

25 **MR. FARRELL:** That was exactly the point

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1 I was going to make, your Honor. It was thought to  
2 be a report prepared for the defendants. When we  
3 learned that Decof & Grimm and Mr. Glassley were  
4 actually the experts --

5 **SPECIAL MASTER:** On the other side.

6 **MR. FARRELL:** -- for the plaintiff, we  
7 took the document off of the privilege log and  
8 produced it to Mr. Placitella.

9 So any suggestion that this was a fraud  
10 or effort to conceal something is simply untrue.

11 **SPECIAL MASTER:** Okay. And in fact the  
12 designation on the privilege log is just verbatim the  
13 first X number of words in the title of the document.

14 **MR. FARRELL:** That is correct. And to  
15 the extent the argument is that this was done in  
16 multiple cases or something, I believe this is the  
17 only instance of it occurring. And since that time  
18 it has not appeared on any privilege log.

19 **SPECIAL MASTER:** Okay. All right.  
20 We've gotten to the bottom of that mystery.

21 **MR. PLACITELLA:** Your Honor, all you  
22 have to do is read the report and you'll know -- you  
23 can't mistake that this was a defense report. I'm  
24 happy for you to read the whole thing.

25 And Decof & Grimm was not Cahill Gordon.

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1 Decof & Grimm was not the local defense lawyer. This  
2 was no coincidence.

3                   **SPECIAL MASTER:** Well, I don't know  
4 that. I know that because I've been told that today.

5                   **MR. PLACITELLA:** You can't read this  
6 report and come to the conclusion that it's a defense  
7 report.

8                   **SPECIAL MASTER:** I don't know what due  
9 diligence whoever it was did when they were preparing  
10 that privilege log.

11                  I know that it was not Kirkland & Ellis.  
12 And frankly, I would expect better from Kirkland &  
13 Ellis. And I'm glad that they actually went back and  
14 double-checked it and released the report, because it  
15 was not work product.

16                  So I understand your concern. I'm not  
17 sure that it gets the credit that you want to give  
18 it.

19                  **MR. PLACITELLA:** It's not to point the  
20 finger at Kirkland & Ellis. I never intended to do  
21 that. They weren't involved.

22                  **SPECIAL MASTER:** At least not in this  
23 instance.

24                  **MR. PLACITELLA:** No, no, no, no.  
25 Despite the acrimony, we get along fine.

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1                   And that wasn't my issue. They weren't  
2 in the case at this point.

3                   My issue was that this was produced in  
4 2006. The lawyers for Engelhard and BASF knew what  
5 this was. And for the next three years summary  
6 judgment motions were still filed saying there was no  
7 evidence, letters were still written saying that  
8 there was no evidence, judges were still being told  
9 there was no evidence.

10                  And there's no getting away from the  
11 fact that they had a report saying that there was  
12 evidence.

13                  And this report raised the whole issue  
14 of the Westfall case all over again, because if you  
15 look on their -- and I'll show you later. If you  
16 look on the privilege log, there's all kinds of  
17 references to the Westfall case.

18                  So in 2005-2006, even if everyone forgot  
19 and didn't know about the Westfall case, it was hot  
20 and heavy as part of what was going on here and the  
21 reason, I would submit to you, and you can infer,  
22 that this case was settled quietly and this report  
23 was buried. It is a logical inference that it was  
24 ongoing.

25                  And I don't know that it matters, if it

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1 does not, I will skip it, but there are numerous  
2 examples to show that this was not just Cahill  
3 Gordon, that their in-house counsel was getting  
4 copied on the letters that were being sent out.

5                   **SPECIAL MASTER:** Well, Mr. Sloane is  
6 from Cahill Gordon.

7                   **MR. PLACITELLA:** Michael Hassett is  
8 Engelhard in-house counsel.

9                   **SPECIAL MASTER:** Okay. But I'm just  
10 saying that because --

11                  **MR. PLACITELLA:** Yes.

12                  **SPECIAL MASTER:** -- that's a little  
13 misleading when you say Mr. Sloane and Michael  
14 Hassett and underneath it you're saying Engelhard  
15 in-house legal.

16                  **MR. PLACITELLA:** Yes. Fair enough.

17                  **SPECIAL MASTER:** Only Mr. Hassett was  
18 Engelhard, correct?

19                  **MR. PLACITELLA:** Fair enough. And I'm  
20 happy to -- Charles Carter was an Engelhard  
21 executive. He answered and swore to interrogatories  
22 that were false, in addition to his affidavit.

23                  Michael Hassett, who was the associate  
24 general counsel, actually answered the  
25 interrogatories and swore to them under oath. Just

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1 like in Jedlowski.

2 I don't know that we need to spend --  
3 I'm happy to do it, but I want to take some guidance  
4 from the Court on spoliation. I will just give you a  
5 summary slide because a lot of it is already in the  
6 brief.

7 **SPECIAL MASTER:** Which one? The  
8 appendix?

9 **MR. PLACITELLA:** The appendix. What  
10 evidence is still missing today? All of the original  
11 testing reports with three exceptions are missing.

12 They have found copies of some of the  
13 reports. But even the reports they've found are  
14 missing attachments. The attachments would be the  
15 scientific data -- not every time. Some are complete  
16 to be fair. Many of the reports are missing the  
17 scientific data. That would be important to  
18 interpret the reports, to verify what was in them.  
19 They're not there.

20 I took the deposition of the corporate  
21 representative. There are only three original  
22 documents remaining.

23 **SPECIAL MASTER:** Why is that even  
24 relevant --

25 **MR. PLACITELLA:** It's relevant --

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1                   **SPECIAL MASTER:** -- that there's only  
2       three original documents left if everything else they  
3       have is copies?

4                   **MR. PLACITELLA:** Because the copies,  
5       they only have a portion of what was there.

6                   **SPECIAL MASTER:** Well, they have a  
7       portion.

8                   **MR. PLACITELLA:** Right.

9                   **SPECIAL MASTER:** And that goes to the  
10      weight of that document. It doesn't go to its  
11      admissibility.

12                  **MR. PLACITELLA:** No, no. I'm  
13      misspeaking. There are two issues. There is the  
14      entirety of what was the testing documents. They  
15      have some portion of those, not all. And out of  
16      that portion they have another that are incomplete.

17                  So there are many documents, testing  
18      documents that they have not been able to find.

19                  **SPECIAL MASTER:** And these are documents  
20      that go back how far?

21                  **MR. PLACITELLA:** They go back all the  
22      way to the 70s. Okay. And they don't have Dr.  
23      Hemstock's files. They don't have Dr. Oulton. Dr.  
24      Oulton was the scientist who was in charge of keeping  
25      all the raw data, all the backup data. His files are

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1 missing.

2                   **SPECIAL MASTER:** When did he stop  
3 working there?

4                   **MR. PLACITELLA:** He stopped there  
5 sometime in the early 80s.

6                   **SPECIAL MASTER:** So 30 years ago.

7                   **MR. PLACITELLA:** Correct. All of the  
8 original Westfall depositions are missing. The  
9 majority of the exhibits to those depositions are  
10 missing. The results from the Engelhard study of  
11 the Johnson mine are missing.

12                  I mean, I could go through this in great  
13 detail, and I'm happy to do it. But I'm trying to  
14 get through this presentation and get to the -- I'm  
15 happy to supplement it.

16                  But I will -- and, you know, I went to  
17 the witnesses and I said, Ellen Poole, out of the 51  
18 documents at the Hemstock deposition, they only have  
19 10. And I highlighted those.

20                  **MR. ASSAF:** Excuse me. May I just see  
21 slide 133 for another second, the listing? Sorry.

22                  **SPECIAL MASTER:** Go back one more.

23                  **MR. ASSAF:** The previous slide. All  
24 original depositions?

25                  **MR. PLACITELLA:** Well, yes, that's what

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1 I said, all original depositions.

2 **MR. ASSAF:** Okay.

3 **MR. PLACITELLA:** They have --

4 **MR. ASSAF:** Sorry. Okay. That's  
5 what -- I thought he said all depositions. I was  
6 like, I -- okay. Sorry.

7 **SPECIAL MASTER:** I can read.

8 **MR. PLACITELLA:** The slide says all  
9 original depositions. They have produced some  
10 depositions, not all. They've produced --

11 **SPECIAL MASTER:** Out of a case that was  
12 originally filed in 1979.

13 **MR. PLACITELLA:** Yes, your Honor.

14 **SPECIAL MASTER:** Okay.

15 **MR. PLACITELLA:** But they had a duty  
16 to --

17 **SPECIAL MASTER:** Do you keep in your  
18 firm files from cases in 1979?

19 **MR. PLACITELLA:** Your Honor, I am not a  
20 defendant being sued over and over.

21 **SPECIAL MASTER:** It doesn't matter  
22 whether you are or not.

23 **MR. PLACITELLA:** Yeah, we probably have  
24 it on archive somewhere. But there is a duty to --

25 **SPECIAL MASTER:** I'd be stunned if you

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1 did. But that's a different story.

2                   **MR. PLACITELLA:** Well, I wasn't  
3 practicing then.

4                   **SPECIAL MASTER:** In '79?

5                   **MR. PLACITELLA:** The point is -- sorry.

6                   **SPECIAL MASTER:** Now you're making me  
7 feel old.

8                   **MR. PLACITELLA:** So the point is they  
9 were being sued and they were --

10                  **SPECIAL MASTER:** And you've insulted  
11 Miss Gussack I want you to know.

12                  **MR. PLACITELLA:** They had a duty to  
13 preserve this evidence, your Honor, that was imposed  
14 upon them.

15                  They were being sued and they knew they  
16 were going to be sued in the future. And Judge  
17 Linares had in fact ruled that they had a duty to  
18 preserve the evidence.

19                  So we asked the witnesses, for example,  
20 Miss Poole, only 10 exhibits were left from the  
21 Hemstock deposition. I then went back --

22                  **SPECIAL MASTER:** Well, did somebody go  
23 back to the lawyers who actually were representing  
24 Engelhard back then and say: Do you have it in your  
25 files?

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1                           **MR. PLACITELLA:** Someone should ask  
2 them. I'm assuming the answer is no, that they  
3 checked, because --

4                           **SPECIAL MASTER:** They said no, they  
5 didn't go back and check?

6                           **MR. PLACITELLA:** I'm assuming that they  
7 did. They're good lawyers. I'm sure they did what  
8 they were obligated to do.

9                           And so, for example, I went to Mr.  
10 Steinmetz in August and I asked him: Let's go  
11 through what you have left.

12                          Now, recall Mr. Steinmetz testified he  
13 didn't believe that Gale was even deposed. Okay.  
14 So now we have Gale's deposition.

15                          So what we did is we went back and  
16 looked at what they've been able to recreate and  
17 compared it to what was produced at the Gale  
18 deposition. And we found that all of the exhibits in  
19 red that he was examined on, they don't exist.

20                          Now, I saw the letter from -- and some  
21 of that was important. Some of those exhibits,  
22 according to Mr. Gale's testimony, were notes he was  
23 taking while he was looking under the microscope  
24 saying what his findings were.

25                          **SPECIAL MASTER:** But he testified at his

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1 deposition about the contents of those notes,  
2 correct?

3 **MR. PLACITELLA:** He testified --

4 **SPECIAL MASTER:** So even though --

5 excuse me. But even though the notes themselves may  
6 not be around anymore, there is testimony as to what  
7 the contents of the document were.

8 **MR. PLACITELLA:** Not really. They  
9 testified what his recollection was. But his notes  
10 had to have been much more detailed, because his  
11 notes were detailing what he was seeing under the  
12 electron microscope.

13 When he was deposed, he was being asked  
14 what he recalled. And sometimes he said in his  
15 deposition I don't recollect this myself, but there  
16 it is in the document. I don't have an independent  
17 recollection. Right.

18 So what was in there is not  
19 insignificant.

20 They say in their brief: Well, he was  
21 asked about Exhibit 50, which was the big binder from  
22 the Hemstock deposition. And he said: Well, yeah, I  
23 see in there, there are a couple of published reports  
24 that were out in the public domain.

25 But he also verifies in his deposition

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1       that there were many other things in that binder that  
2       are never mentioned.

3                   We don't know what was in that binder,  
4       frankly.    We do know that we have no final report at  
5       least in the public domain of what happened in that  
6       investigation.    We would have had his notes, but  
7       they're gone.    We have what's left of his testimony.

8                   So we have a problem.    There's a lot of  
9       evidence missing.    And I'm happy to have a  
10      separate -- I don't want to spend all our time here  
11      on this.    I'm happy to separately address this and  
12      have you rule on it if you want to.   Or they can file  
13      their motion for summary judgment as you've invited  
14      them to do before.

15                  But there is plenty of evidence on a  
16       prima facie basis that there is still evidence  
17       missing that they had a duty to preserve and they did  
18       not.

19                  **SPECIAL MASTER:**   And then tie that  
20       notion to what your prima facie basis is here,  
21       because whether they had a duty to preserve or not,  
22       the issue is have you demonstrated on a prima facie  
23       basis to a fair preponderance of the evidence that  
24       there is a factual basis for a good faith belief that  
25       the exception to the attorney/client privilege should

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1 apply?

2                   **MR. PLACITELLA:** Yes. And we believe  
3 that we have done that. We believe we have  
4 demonstrated to you that they had evidence. It was  
5 evidence that was not insignificant. They had  
6 multiple tests, not one or two tests. They had  
7 scientists testify as to what they found. The  
8 scientists did not say the evidence was nonsense.  
9 They qualified where they could have.

10                  But they had both the data, the reports,  
11 the sworn testimony. They had all of that. Yet they  
12 told litigants and courts that the data did not  
13 exist, that the testimony did not exist, that the  
14 information did not exist, that there was no  
15 evidence, not that there was unreliable evidence.  
16 They could have couched it.

17                  And on that basis -- and then we have  
18 them frankly boasting about the success of what they  
19 did.

20                  So independent of the issue of what  
21 they've been able to dig up, what they've been able  
22 to dig up only proves our case of what was withheld  
23 from these litigants, because you have to look at the  
24 point in time when the representations were made.

25                  So the fact that they have dug stuff up,

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1       they found a box that they -- somebody had in, you  
2       know, some file in Iron Mountain, only proves that  
3       the representations they made were wrong.

4                   And you only have to look at this.

5       Right.    This is the Cahill collection.

6                   **SPECIAL MASTER:**   You mean the Cahill  
7       compilation.

8                   **MR. PLACITELLA:**   The Cahill compilation.

9       The Cahill compilation as it has been represented is  
10      all -- I know it's not all because we went through  
11      this with Mr. Steinmetz.   But a number of testing  
12      documents.

13                  And that compilation has been in the  
14      files of BASF by their own admission.   It was in the  
15      personal file of Mr. Dornbusch by their  
16      representation of their counsel -- I'm sorry, of  
17      their corporate representative.

18                  That compilation of all of the testing  
19      documents, when they said we have no testing  
20      documents, there is no evidence, when the general  
21      counsel who worked in the same office was swearing on  
22      interrogatories that the information did not exist,  
23      this proves it.   So the fact that they found it only  
24      proves it.

25                  Now, why do we think you have to look at

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1 that? Because they have stated --

2                   **SPECIAL MASTER:** It's Exhibit 3 on your  
3 submission. I looked at it.

4                   **MR. PLACITELLA:** Right. Well, you  
5 didn't look at the whole thing.

6                   **SPECIAL MASTER:** Well, I looked at what  
7 you gave me.

8                   **MR. PLACITELLA:** Yes, but --

9                   **SPECIAL MASTER:** Which by the way is  
10 probably -- that entry alone is probably 150 pages.

11                  **MR. PLACITELLA:** Yes.

12                  **SPECIAL MASTER:** Actually more than  
13 that. It's double-sided.

14                  **MR. PLACITELLA:** But what's missing from  
15 that, your Honor?

16                  **SPECIAL MASTER:** Well, the first couple  
17 entries where it says privileged documents  
18 potentially omitted.

19                  **MR. PLACITELLA:** Yes, your Honor. And  
20 we're saying that you should --

21                  **SPECIAL MASTER:** And there's three of  
22 those.

23                  **MR. PLACITELLA:** They have represented  
24 that the Cahill compilation includes testing  
25 information, information relevant to the issue of

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1 asbestos in the Emtal talc. They are withholding  
2 documents from that compilation.

3 We have indicated in our original  
4 submission, they say we did not identify the  
5 documents we wanted you to look at, but we did  
6 identify this document on our original submission.  
7 And we are asking you --

8 **SPECIAL MASTER:** That was the one that  
9 was miscited in --

10 **MR. PLACITELLA:** Right. The wrong  
11 footnote.

12 **SPECIAL MASTER:** Well, the right  
13 footnote, wrong identification.

14 **MR. PLACITELLA:** We are asking you --

15 **SPECIAL MASTER:** And Mr. Jared  
16 Placitella is throwing himself under the bus over  
17 that one.

18 **MR. PLACITELLA:** I would never do that.

19 **SPECIAL MASTER:** He did it to himself.

20 **MR. PLACITELLA:** We are -- keep your  
21 hand down.

22 So we are asking you to look at the  
23 entire compilation, because obviously they've already  
24 admitted that the information is relevant.

25 So then the question is: What were they

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1 withholding? Because if they have admitted that it  
2 was relevant to the issue of testing and they had it  
3 in their possession at the same time the  
4 misrepresentations are being made, that's a prima  
5 facie case to trigger crime fraud.

6                   **SPECIAL MASTER:** Let me ask you this.  
7 The Cahill compilation, did you get that from  
8 Kirkland & Ellis?

9                   **MR. PLACITELLA:** Yes, your Honor.

10                  **SPECIAL MASTER:** And do you have any  
11 reason to believe that the Kirkland & Ellis folks  
12 have asserted attorney/client privilege or attorney  
13 work product on documents where the assertion was not  
14 at least colorable?

15                  **MR. PLACITELLA:** I think they made a  
16 good faith judgment that they could withhold those  
17 documents --

18                  **SPECIAL MASTER:** I'm thinking in --

19                  **MR. PLACITELLA:** -- on the basis that  
20 they have asserted.

21                  **SPECIAL MASTER:** I'm thinking in terms  
22 of the other document that you discussed that  
23 appeared on a privilege log --

24                  **MR. PLACITELLA:** No.

25                  **SPECIAL MASTER** -- that they did not

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1 prepare --

2                   **MR. PLACITELLA:** No.

3                   **SPECIAL MASTER:** -- they took a look at  
4 it and they said: This doesn't belong on the  
5 privilege log --

6                   **MR. PLACITELLA:** No, no, no, I don't  
7 think --

8                   **SPECIAL MASTER:** -- and they handled it  
9 over.

10                  **MR. PLACITELLA:** I don't have any --  
11 that's not what they do.

12                  **SPECIAL MASTER:** Okay.

13                  **MR. PLACITELLA:** No.

14                  **SPECIAL MASTER:** So it is fair for me to  
15 assume that at least for the first three entries in  
16 the Cahill compilation where they are asserting  
17 privilege, that at least there's a good faith basis  
18 for that assertion?

19                  **MR. PLACITELLA:** I understand the good  
20 faith basis. And in fact, I know what the documents  
21 are. And I can't say, you know, what they are --

22                  **SPECIAL MASTER:** No, you can't.

23                  **MR. PLACITELLA:** -- I do believe --

24                  **SPECIAL MASTER:** Not to me at least.

25                  **MR. PLACITELLA:** -- they had a good

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1 faith basis to make the --

4 MR. PLACITELLA: -- assertion initially.

5 **SPECIAL MASTER:** Okay.

6                           **MR. PLACITELLA:** But we're saying that  
7 you need to look at these documents. We believe that  
8 they've already admitted that the compilation,  
9 including the documents that are being withheld, are  
10 relevant on that very issue that the  
11 misrepresentation is being made.

12                           And if this document was in Mr.  
13 Dornbusch's personal file while his office was  
14 swearing under oath that no documents existed, then  
15 all of it has to come out, not just the documents  
16 that they so choose. So -- somebody's passing me a  
17 note.

18                           **SPECIAL MASTER:** I think it's Mr. Assaf  
19 telling you that you've gone too long.

20 MR. PLACITELLA: Well, I'm almost done.

22                           **MR. PLACITELLA:** I'm almost done. So  
23 let me just -- then we've asked for the evidentiary  
24 record.

25 I heard -- now, there is a difference.

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1 We are not asking for you -- we've already been told  
2 the Court did not want Justice Stein's opinion. We  
3 understand that.

4 What we're saying is that you should  
5 look at two things.

6 **SPECIAL MASTER:** I can't. The order  
7 from the Supreme Court impounds that entire record.  
8 That's what it says, the record is impounded.

9 You don't want to run the risk of giving  
10 it to me. And I certainly do not want to run the  
11 risk of looking at something that's been impounded,  
12 not when I know that it's been impounded. I can't  
13 say: Gee, I didn't know that. I now know it. I  
14 have a copy of the Court's order.

15 **MR. PLACITELLA:** We may have to do  
16 something to remedy that. But I understand.

17 **SPECIAL MASTER:** Well, you must -- I  
18 can't --

19 **MR. PLACITELLA:** But I understand your  
20 point. Just so the record is clear though, when our  
21 brief was originally filed, we asked for this  
22 information.

23 **SPECIAL MASTER:** The order came out  
24 actually after your reply brief was filed. So I'm  
25 not blaming you for it. I'm just saying the state of

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1 the universe is different now than it was when you  
2 were asking for the relief here. And I just can't  
3 accept that.

4                   **MR. PLACITELLA:** I understand, your  
5 Honor. The point I'm making here is a statement was  
6 made that we never identified any documents that we  
7 wanted you to look at and therefore somehow we were  
8 deficient or our submission was deficient. That's  
9 actually not true. We first identified the  
10 compilation. We asked you to look at that.

11                  **SPECIAL MASTER:** Which I did because  
12 gave it to me.

13                  **MR. PLACITELLA:** No, you didn't look at  
14 the documents being withheld.

15                  **SPECIAL MASTER:** Okay.

16                  **MR. PLACITELLA:** We asked you to look  
17 initially at the evidentiary record because there are  
18 depositions in that record. And those depositions  
19 themselves --

20                  **SPECIAL MASTER:** Which evidentiary  
21 record?

22                  **MR. PLACITELLA:** Of the Samson case.  
23 I'm saying initially they said we did not identify to  
24 you documents. That was before this order came out.  
25 We actually did identify documents. We identified

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1 the Samson record. I did not want to be anymore  
2 descript than that for fear of violating the order  
3 myself.

4 So what we did do is we gave you -- you  
5 now have a list from us.

6 **SPECIAL MASTER:** I have a list. All I  
7 have is a list of Bates numbers. That doesn't make  
8 me any smarter.

9 **MR. PLACITELLA:** So I want to put some  
10 things in context for you, and I went back and did  
11 this, and how we can deal with the impounding order,  
12 because now it's an issue. It wasn't before.

13 So if you look, for example, at the  
14 Ashton affidavit and you compare that to the  
15 privilege log, you can see all of the documents that  
16 surrounded the creation of the Ashton affidavit that  
17 are being withheld.

18 We believe, given the fact that the  
19 Ashton affidavit is at least misleading on its face,  
20 if not an outright misrepresentation, that you should  
21 look at the documents that are behind the Ashton  
22 affidavit. And we can identify them for you. And  
23 here they are.

24 **SPECIAL MASTER:** Did you do that before  
25 today?

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1                           **MR. PLACITELLA:** Because what we did  
2 was, we did it by time frame.

3                           **SPECIAL MASTER:** Please answer my  
4 question.

5                           **MR. PLACITELLA:** I'm sorry.

6                           **SPECIAL MASTER:** Did you identify those  
7 documents as being disclosed or related or referred  
8 to in the Ashton affidavit that you're now presenting  
9 in this Power Point presentation on number 169, did  
10 you ever get that to me before today?

11                          **MR. PLACITELLA:** I did not, because  
12 frankly I was doing it in the last couple of days,  
13 trying to figure out how to get around the fact that  
14 I'm not now allowed to talk about even asking for  
15 what was under the Samson proceeding.

16                          So I'm trying to come up with a way to  
17 put in context a way to deal with this.

18                          **SPECIAL MASTER:** Okay.

19                          **MR. PLACITELLA:** I mean, it's a little  
20 bit of a moving target. And I apologize.

21                          **SPECIAL MASTER:** Well, you're supposed  
22 to make my life easier, not harder.

23                          **MR. PLACITELLA:** I understand.

24                          **SPECIAL MASTER:** But I'll blame Mr.  
25 Pasternack. It's your time to get blamed.

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1                           **MR. PLACITELLA:** The same thing, we can  
2 identify in time the entries that went into creating  
3 the Carter affidavit.

4                           **SPECIAL MASTER:** And again, same  
5 question?

6                           **MR. PLACITELLA:** Same answer. On the  
7 asbestos in mine -- I call it the asbestos in mine  
8 study, the study that was done in 1979, we can  
9 identify in time the documents that appear to relate  
10 to that study.

11                          So for example, there are a bunch of  
12 documents listed in time from the actual scientists  
13 versus some lawyer.

14                          **SPECIAL MASTER:** Do we have a number for  
15 this shot?

16                          **MR. PLACITELLA:** It's 171.

17                          **SPECIAL MASTER:** Okay.

18                          **MR. ASSAF:** Your Honor, just following  
19 up on your earlier comment, I would ask the number of  
20 the slide be put in, but also that Mr. Placitella --

21                          **SPECIAL MASTER:** I think every slide  
22 that was shown here today must be submitted.

23                          **MR. PLACITELLA:** I'm going to do that.

24                          **SPECIAL MASTER:** And I know we talked  
25 about that at the break.

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1                           **MR. PLACITELLA:** Right. I'm going to do  
2 that.

3                           **SPECIAL MASTER:** I just wanted to put  
4 that on the record.

5                           **MR. ASSAF:** And I think to your first  
6 question, I think the answer is the same for all  
7 these. These have not been produced before today; in  
8 other words, have not been collated. I just want  
9 that in the record. This is the first time anybody's  
10 seen this correlation, just like on the first  
11 question you asked.

12                          **SPECIAL MASTER:** Okay. I assume that  
13 based upon Mr. Placitella's response to my question  
14 earlier, that pretty much everything that's in this  
15 section of his argument is stuff that he has  
16 developed in the last few days and therefore many of  
17 us in this room are seeing this for the first time.

18                          Is that fair?

19                          **MR. PLACITELLA:** That's fair. That's  
20 fair. Documents related to I call it the purge  
21 memo, and this is a good example. If you see the  
22 purge memo was March 7, 1984. And if you actually  
23 look at the privilege log, there are five other  
24 entries on that exact date. And it talks about file  
25 preservation. And it comes from Cahill Gordon. We

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1 think you need to look at that.

2                   **SPECIAL MASTER:** These are all memos  
3 from Mr. Sloane to someone in-house at BASF?

4                   **MR. PLACITELLA:** Correct.

5                   **SPECIAL MASTER:** All five of those,  
6 they're the ones in yellow?

7                   **MR. PLACITELLA:** Correct.

8                   **MR. COREN:** That's not correct. I think  
9 Kempo is Cahill Gordon, your Honor.

10                  **SPECIAL MASTER:** So it's a within Cahill  
11 Gordon communication?

12                  **MR. COREN:** Yes.

13                  **MR. PLACITELLA:** But it's the same exact  
14 date.

15                  **SPECIAL MASTER:** I understand that. But  
16 it's still within Cahill Gordon. Never got to BASF.

17                  **MR. PLACITELLA:** I'm not allowed to talk  
18 about that.

19                  Documents that relate to the Westfall  
20 settlement all the way up to the purge memo, and we  
21 believe we've showed you that they've destroyed the  
22 Glassley evidence.

23                  We showed you the date of the Westfall  
24 settlement. In between the Westfall settlement and  
25 the purge memo are a number of entries in that also

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1 is destruction of the Glassley evidence. That's the  
2 time frame that we're talking about.

3                   **SPECIAL MASTER:** During which time the  
4 Schwartz case was pending in California?

5                   **MR. PLACITELLA:** Right. We believe --  
6 and there are actually entries here that talk about  
7 these issues.

8                   We believe you need to look at the  
9 documents from the date of the settlement to the date  
10 of the purge memo to see really what the context was.  
11 Was it really a document preservation memo? You can  
12 find that out.

13                  And then for a lot of these  
14 misrepresentations there are entries that correspond  
15 to -- in time at least to the misrepresentations.

16                  The Martin case with Dr. Glassley, there  
17 are a number of entries in the privilege log related  
18 to the Martin case. And it actually says Martin  
19 Emtal litigation. We believe based upon what we've  
20 shown you that you should look at that.

21                  And in fact, one entry on the privilege  
22 log talks about -- I'll wait -- the 7/23/2005 entry  
23 actually talks about what to do about the Westfall  
24 deposition.

25                  **SPECIAL MASTER:** Can you do me a favor?

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1     Can you go back --

2                   **MR. PLACITELLA:** I want to make sure,  
3 because I didn't show you each one of these and I  
4 want --

5                   **SPECIAL MASTER:** Stop right there. Oh,  
6 you went one too many. That one. It says in the  
7 bottom righthand corner Exhibit 21B.

8                   **MR. JARED PLACITELLA:** That's the image,  
9 your Honor. That's the image of the May 17, 1989,  
10 letter.

11                  **SPECIAL MASTER:** Of the letter?

12                  **MR. JARED PLACITELLA:** Right.

13                  **SPECIAL MASTER:** Exhibit 21 is the  
14 transcript of the deposition of Ernest Baim.

15                  **MR. JARED PLACITELLA:** You're correct,  
16 your Honor. I apologize. It's paragraph 21 of the  
17 certification in support of the motion, but it's  
18 really Exhibit 17.

19                  **SPECIAL MASTER:** Okay. Is it 17B?

20                  **MR. JARED PLACITELLA:** Yes, your Honor.

21                  **SPECIAL MASTER:** Okay. And that's a  
22 letter from Mr. Dembrow to Jeffrey Schwartz at Mr.  
23 Rothenberg's firm of May 17, 1989?

24                  **MR. JARED PLACITELLA:** Yes, your Honor.

25                  **SPECIAL MASTER:** Okay.

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1                           **MR. PLACITELLA:** So if you look at this  
2 entry of 7/22/2005, this is during the time the  
3 Martin case was pending. It talks about a review of  
4 the Westfall depositions.

5                           **SPECIAL MASTER:** Who is -- Mr. Dembrow  
6 is at Cahill. Who is --

7                           **MR. PLACITELLA:** Cahill.

8                           **SPECIAL MASTER:** -- M. Sullivan?

9                           **MR. PLACITELLA:** Paralegal at Cahill.

10                          **SPECIAL MASTER:** So this is again a  
11 within Cahill communication.

12                          **MR. PLACITELLA:** Correct. And it's  
13 talking about in 2005, at least on its face, a review  
14 of the Westfall depositions.

15                          **SPECIAL MASTER:** Okay.

16                          **MR. PLACITELLA:** Well, the Westfall  
17 depositions have never been revealed between 1988  
18 when the Ashton affidavit was executed and 2005. But  
19 somebody had the Westfall depositions. When they  
20 swore under oath the depositions didn't exist,  
21 somebody had the depositions.

22                          **SPECIAL MASTER:** Not unless that e-mail  
23 says: I looked for the depositions, I can't find  
24 them, can you help me?

25                          **MR. PLACITELLA:** I guess you'll have to

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1 find out. But somebody knows that the depositions  
2 were taken. And somebody is still answering  
3 interrogatories after this entry saying the  
4 depositions were never taken. Motions are still  
5 being filed.

6 **SPECIAL MASTER:** I don't -- well, I'm  
7 sorry, I don't want to interrupt your argument  
8 anymore. I just -- the rationales that you give to  
9 all of these are obviously the rationale that foots  
10 most cleanly with what you're trying to advance.

11 My problem is that I have to look at it  
12 and say: What are the reasonable inferences of  
13 what's being said?

14 And that one in particular can mean a  
15 hundred different very innocuous, meaningless things  
16 that are not the color you're putting to it.

17 **MR. PLACITELLA:** Yes. But what's the  
18 reasonable inference your Honor?

19 **SPECIAL MASTER:** Well, that's the  
20 problem. What's the reasonable inference?

21 **MR. PLACITELLA:** Well, let me articulate  
22 it.

23 **SPECIAL MASTER:** Is the reasonable  
24 inference the inference that everything that Cahill  
25 Gordon touched somehow had some kind of cooties on

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1 it?

6                           What's the reasonable inference? That's  
7 exactly the problem I'm having.

8                           **MR. PLACITELLA:** Well, the reasonable  
9 inference as I would articulate it to you is as  
10 follows. From 1988 to 1989 they swore under oath no  
11 depositions existed. In 2005 it's clear that at  
12 least they know depositions existed.

13 **SPECIAL MASTER:** No. \_\_\_\_\_

14                           **MR. PLACITELLA:** And of course they did  
15 know because they were at the depositions in 1983.  
16 So they resurface at least in discussions in 2005.

23                           And there may have been an e-mail back  
24 from Miss Sullivan that says: I looked and there are  
25 none.

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1                   This is 2005. And the deposition that  
2 you're talking about was taken 22 years before.

3                   **MR. PLACITELLA:** I'm showing you a  
4 single entry where I believe you can infer that  
5 people at Cahill Gordon knew it was ongoing. All  
6 right.

7                   **SPECIAL MASTER:** You're absolutely  
8 right. I can infer that. The question is, is that  
9 a reasonable inference? That's what I'm struggling  
10 with.

11                  **MR. PLACITELLA:** I believe it's a  
12 reasonable inference for the following reason. They  
13 were at the depositions in 1983.

14                  **SPECIAL MASTER:** You're not hearing me,  
15 Mr. Placitella. Assume they were at the depositions  
16 in 1983. Mr. Dembrow was not handling the  
17 deposition in 1983, was he?

18                  **MR. PLACITELLA:** I'm sure he was not.

19                  **SPECIAL MASTER:** Okay. In 2005, 23  
20 years later, he sends an e-mail to a paralegal about  
21 those depositions. We don't know what the subject  
22 matter is.

23                  But is it reasonable to say that I have  
24 looked at these depositions -- that the e-mail says:  
25 I have looked at these depositions and I'm going to

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1 put them in a very, very dark and deep corner so that  
2 no one can see them? Is that reasonable? I don't  
3 know. I don't think so.

4                   **MR. PLACITELLA:** Was it reasonable, your  
5 Honor, after 2005, knowing that the depositions took  
6 place and that there was a discussion to continue to  
7 swear in answers to interrogatories that no  
8 depositions took place?

9                   **SPECIAL MASTER:** Well, if the paralegal  
10 goes and searches and says we don't have any such  
11 depositions, here you have a lawyer who was not part  
12 of it at the beginning being able to say, well, okay,  
13 there are no depositions.

14                  **MR. PLACITELLA:** Right. And I  
15 understand your issue. That's the purpose of an in  
16 camera review, for you to see that, for you to make  
17 those determinations.

18                  You don't have to make a leap of faith.  
19 I'm saying is there a reasonable good faith belief to  
20 suspect and examine it? And I'm saying if you look  
21 at the entries --

22                  **SPECIAL MASTER:** My problem with that is  
23 that what you're proposing, which is go look at the  
24 documents to then determine if we have a prima facie  
25 case seems to me a post hoc ergo propter hoc kind of

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1 analysis, which I don't think is appropriate under  
2 these circumstances.

3 **MR. PLACITELLA:** Your Honor, that's not  
4 what I'm saying. What I'm saying -- you can do that  
5 under the law, by the way.

6 **SPECIAL MASTER:** I'm not so sure about  
7 that.

8 **MR. PLACITELLA:** I'm pretty sure.

9 **SPECIAL MASTER:** I know you're arguing  
10 it. But I'm not so sure.

11 **MR. PLACITELLA:** You can do that. I  
12 don't think you need to do that.

13 And then I think you need to look at the  
14 documents that -- the privilege log at the time the  
15 fraud was discovered.

16 So for example, I just highlighted this  
17 one, 7/13/2009. This is after the fraud is  
18 discovered in the Paduano case. And it talks about a  
19 discussion with Arthur Dornbusch regarding the  
20 Paduano case.

21 Now, Arthur Dornbusch had been out of  
22 there for three or four years now. They went back  
23 and apparently interviewed Arthur Dornbusch. What he  
24 had to say may be highly relevant to the issue of  
25 what did he know, what information was being

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1 withheld, what documents were destroyed?

2 I mean, all those things I submit are  
3 ripe for your review.

4 **SPECIAL MASTER:** Highly relevant doesn't  
5 mean you waive the privilege or that the privilege  
6 should be pierced.

7 I assume -- not I assume. Relevance  
8 has nothing to do with the inquiry today.

9 The inquiry today is have you  
10 demonstrated by a fair preponderance of the evidence  
11 a *prima facie* case that would sustain the application  
12 of the (a) exception to the attorney/client  
13 privilege?

14 And I will tell you very candidly I  
15 don't think you've argued at all today and only in a  
16 footnote in your original submission and in the last  
17 two pages of your reply brief the Kozlov exceptions.

18 And frankly, I think that's wise,  
19 because I think that the Kozlov exception has been  
20 severely limited of late and in my view properly so.  
21 So I don't think that that's where you want to hang  
22 your hat.

23 You want to hang your hat if at all on  
24 the (2)(a) exception to the attorney/client  
25 privilege, which is fine.

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1                   But there's a process for that, and  
2    that's what I'm trying -- I'm trying to fit all of  
3    this within that process.

4                   **MR. PLACITELLA:** We rely on our brief as  
5    it relates to the Kozlov exception. I'm trying not  
6    to spend all the time -- you know, we only have so  
7    much time.

8                   But let me just bring it back to --

9                   **SPECIAL MASTER:** And you've been at it  
10   for two hours and 15 minutes.

11                  **MR. PLACITELLA:** Let me just -- let me  
12   end here. We started with is there a reasonable  
13   basis to suspect that the privilege-holder was  
14   intending to commit a crime or a fraud in violation  
15   of the New Jersey statute?

16                  I believe that within our submissions  
17   and what we've highlighted here today we have  
18   demonstrated to you the following. BASF or Engelhard  
19   had numerous tests and information that there was  
20   asbestos in their talc at whatever levels. They  
21   sent those tests out. They were verified by  
22   multiple laboratories. They verified it themselves.  
23   Their scientists testified to the same.

24                  In the face of that, they told their  
25   customers there was not even a trace, nothing. It

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1 was asbestos-free.

2                   When it came to having testimony, their  
3 lawyers, their scientists swore under oath with their  
4 lawyers sitting right there that they found asbestos  
5 in the talc at whatever levels.

6                   Those same lawyers who sat in those  
7 depositions, the same lawyers were in charge of that  
8 litigation. Many have showed up at conferences with  
9 courts, many wrote the letters, the same lawyers  
10 wrote letters to litigants saying there was no  
11 evidence of asbestos in the talc. They told courts  
12 there was no evidence of asbestos in the talc. They  
13 had cases and they bragged about having dismissals,  
14 about there being no evidence of asbestos in the  
15 talc.

16                  If you look at the totality of the  
17 evidence, the fact that they had the information,  
18 that they were there, there's no mistaking it, and  
19 they made those representations knowing that they  
20 were not true, that we have demonstrated to you by  
21 more than a preponderance of the evidence, by more  
22 than a reasonable basis, I think it's clear and  
23 convincing that a prima facie case of crime fraud  
24 under our rule and the expansive definition that our  
25 rule has been given by our Supreme Court provides.

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1                   And if you look at the totality of the  
2 evidence that we've given to you and not the little  
3 pieces, the totality of the evidence, you have to  
4 come -- we submit you have to conclude that we need  
5 to go to the next step, that we've given you enough  
6 evidence to make out a *prima facie* case for you to go  
7 look at the documents and make a decision about  
8 whether those documents are in violation given all  
9 the circumstances of our rules and whether they  
10 should be released.

11                  **SPECIAL MASTER:** And the documents you  
12 want me to look at are those that are listed in  
13 Appendix C to your motion?

14                  **MR. PLACITELLA:** Yes. I understand your  
15 position about you can't see the whole record. But  
16 let me say this --

17                  **SPECIAL MASTER:** My question is simple.  
18 Okay. You have an Appendix C which is submitted  
19 only to the BASF folks and me that lists what I  
20 number to be 61 documents. Some of them are kind of  
21 hard to tell because there are three entries in one  
22 box. When there's two entries I assume that the  
23 first entry is the beginning page and the last --  
24 the entries on the last page. That's all assumption  
25 on my part.

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1                   But looking at Exhibit C, you're asking  
2       me to look at those 61 entries to determine whether  
3       the attorney/client privilege should be pierced in  
4       respect of those documents only?

5                   **MR. PLACITELLA:** And included within  
6       that, and I think it's there, is the Cahill  
7       compilation, the documents within the Cahill  
8       compilation.

9                   **SPECIAL MASTER:** Well, I can't make that  
10      up. Okay. You gave me an appendix that listed the  
11      documents that you think are subject to review.  
12      Quote, plaintiffs list the following documents for  
13      review should the Court deem an in camera evaluation  
14      necessary.

15                  These are the documents that you want  
16      disclosed?

17                  **MR. PLACITELLA:** Yes.

18                  **SPECIAL MASTER:** Okay. And they're  
19      marked by Bates number, so they are what they are.

20                  **MR. PLACITELLA:** And we asked for in our  
21      brief, if it's not there by Bates number, I think it  
22      actually is, that you review the balance of the  
23      documents in the Cahill compilation.

24                  **SPECIAL MASTER:** All right. I don't  
25      know what those are because they're not marked.

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1                   **MR. PLACITELLA:** It's a single exhibit.

2                   **SPECIAL MASTER:** No. There's an exhibit  
3 of the Cahill compilation. But there are three --  
4 what appear to be three documents that were withheld.

5                   **MR. PLACITELLA:** I think there's more  
6 than that, your Honor.

7                   **SPECIAL MASTER:** Well, I'm just --  
8 there might be more because I'm looking -- there's  
9 one at the very end. All right. We're going to  
10 make this really easy.

11                  Mr. Jared Placitella, I want you to take  
12 your exhibit, your Appendix C, and I want you to  
13 provide me a complete list of the documents that you  
14 want me to look at. Okay. And those are the  
15 documents about which you are making a claim should  
16 be disclosed as an exception to the attorney/client  
17 privilege.

18                  If it's not on that list, it's not going  
19 to be considered. And it's not an invitation to  
20 make that list any broader or any longer than what it  
21 already is.

22                  Do we understand each other?

23                  **MR. JARED PLACITELLA:** Yes, your Honor.

24                  **SPECIAL MASTER:** You're going to get  
25 that to me by Monday? Can you do that? Is that too

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1 soon?

2 **MR. JARED PLACITELLA:** It might --

3 **SPECIAL MASTER:** Speak up.

4 **MR. JARED PLACITELLA:** It might be too

5 soon, your Honor.

6 **SPECIAL MASTER:** Okay. When can you get  
7 it to me by.

8 **MR. JARED PLACITELLA:** Can we do  
9 Wednesday?

10 **SPECIAL MASTER:** Wednesday is fine.

11 That's the 28th. Seton Hall plays Villanova that  
12 night in Newark. Basketball that is.

13 **MR. JARED PLACITELLA:** Yes, your Honor.

14 **SPECIAL MASTER:** Anything else, Mr.  
15 Placitella?

16 **MR. PLACITELLA:** No, your Honor.

17 **SPECIAL MASTER:** Okay. I don't know  
18 who's going speak on behalf of BASF or Cahill, but we  
19 need about a five minute break.

20 And I should tell everyone what Mr.  
21 Placitella told me during the earlier break. He has  
22 a hard stop at 3:30.

23 But there are five other lawyers on  
24 behalf of the plaintiffs here. I'm sure that among  
25 them collectively they will be able to provide an

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1 approximation of Mr. Placitella's advocacy. So we're  
2 going to rely on that, if okay with you. I don't  
3 want to hold you up, Mr. Placitella.

4 **MR. PLACITELLA:** Well, I'll make a  
5 couple phone calls.

6 **SPECIAL MASTER:** Well, no, what you got  
7 to do is important. So let's take a short break.

8 (Break.)

9 **SPECIAL MASTER:** Mr. Assaf, are you  
10 doing the honors?

11 **MR. ASSAF:** I'm going to have a few  
12 words, your Honor, and then I'm going turn it over to  
13 Mr. Bress to handle some of legal issues.

14 And then Mr. Farrell, with the kindness  
15 of Mr. Placitella, I think is going to take apart a  
16 couple of Mr. Placitella's slides. So he'll ask him  
17 to put up, for example, slide 33.

18 And since we don't have the slides yet,  
19 but I think Mr. Placitella or Jared will help us out  
20 on that one.

21 **MR. PLACITELLA:** We got a little  
22 technical problem I just found out. We're in the  
23 same -- we use the same connection.

24 **MR. ASSAF:** We'll take the other one  
25 down.

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1                           **MR. PLACITELLA:** And Sean apparently  
2 took the adapter.

3                           **SPECIAL MASTER:** Okay. We'll muddle  
4 along as best we can. Okay.

5                           **MR. ASSAF:** And so, your Honor, I'm  
6 going to turn it over to Mr. Bress.

7                           **SPECIAL MASTER:** Mr. Pasternack, do you  
8 have those?

9                           **MR. PASTERNAK:** No, I don't.

10                          **SPECIAL MASTER:** You don't have the  
11 slides?

12                          **MR. PASTERNAK:** It's on his laptop.

13                          **SPECIAL MASTER:** Can you e-mail them to  
14 whom ever it is that's -- is that you, Mr. Anguas?

15                          **MR. ANGUAS:** No, I'm just over here  
16 presenting for Kirkland.

17                          **SPECIAL MASTER:** Right. If he e-mails  
18 them to you, you can then present them for the  
19 Kirkland side, right?

20                          **MR. ANGUAS:** Right.

21                          **MR. ASSAF:** That would be great.

22                          **SPECIAL MASTER:** So can you do that?

23                          **MR. PLACITELLA:** Well, I have to figure  
24 out -- I can't e-mail all the slides because I only  
25 showed a small portion of them.

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1                           **MR. ASSAF:** Mr. Roth is going to bring  
2 the slides back -- or the adapter back, so I think  
3 the problem is solved.

4                           **SPECIAL MASTER:** Okay. Whatever. If  
5 not, I'm going to submit you to the tender mercies of  
6 Mr. Reiley, which means none of you is going to like  
7 what the results are going to be. I speak from  
8 experience.

9                           **MR. ASSAF:** Well, thank you, your Honor.  
10 Before I turn it over to Mr. Bress and Mr. Farrell, I  
11 do have two -- three procedural points I'd like to  
12 raise.

13                          The first is actually early on in the  
14 argument in response to one of your questions,  
15 plaintiffs' counsel said BASF continued the fraud  
16 after the acquisition and the fraud would still be  
17 continuing today but for being uncovered in 2009.

18                          **SPECIAL MASTER:** Other than the  
19 rhetorical flourish that I assume all of those  
20 statements have --

21                          **MR. ASSAF:** Well, I just can't -- a lot  
22 of things in this case, we'll argue about a lot of  
23 facts. But the notion that BASF was somehow involved  
24 in orchestrating this fraud, Mr. Placitella knows  
25 that's untrue. In prior iterations he's told Courts

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1 that. And I can't allow that to go unrebutted.

2 Number 2, or along that line, I think  
3 your Honor raised this question --

4 **SPECIAL MASTER:** Tell me, Mr. Assaf,  
5 when did Kirkland start representing BASF in this  
6 matter?

7 **MR. ASSAF:** We got a call in November of  
8 2009. And I was -- that's my lead into the next  
9 point, your Honor.

10 **SPECIAL MASTER:** I knew that.

11 **MR. ASSAF:** We were engaged in 2010  
12 fully. And I talked to Miss Desai at the break. In  
13 terms of the document efforts that your Honor I think  
14 asked some questions about, it took us a while to  
15 start to uncover all of these documents. BASF has  
16 spent literally millions of dollars going to storage  
17 facilities, going to Cahill storage facilities,  
18 replicating whatever documents existed for this  
19 legacy business that went out of business in 1982  
20 that it acquired in 2006.

21 So again, I just don't want your Honor  
22 to think BASF has done anything except exercise  
23 outstanding stewardship of a problem that they  
24 inherited.

25 **SPECIAL MASTER:** I will tell you that,

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1 at least as far as I can tell, this case was filed in  
2 March of 2011. And there's been nothing that has  
3 been said to me that would lead me to believe that  
4 BASF or Cahill has done anything since the filing of  
5 this lawsuit other than act in the manner that I  
6 would expect litigants and their counsel to act. So  
7 that's really not a problem.

8 I think what Mr. Placitella's -- the  
9 import of what Mr. Placitella was trying to say was  
10 that if you look at everything up until that point,  
11 it suffices to establish a prima facie case that by a  
12 preponderance of the evidence there is a reasonable  
13 basis upon which to pierce the attorney/client  
14 privilege.

15 Now, that's a very vanilla statement  
16 without any of the rhetoric that honestly I fully  
17 expect advocates to throw in every so often. After a  
18 while, if you do it too often, it loses its  
19 effectiveness, which sounds to me as being somewhat  
20 counterproductive.

21 But be that as it may, that's what I  
22 understood him to say.

23 So I don't think that Mr. Placitella or  
24 anybody on the plaintiffs' side is indicting the  
25 current iteration of the clients and lawyers on the

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1 defense side. I don't think that's the case at all.

2 Am I right, Mr. Placitella?

3 **MR. PLACITELLA:** Never suggested to the  
4 contrary.

5 **SPECIAL MASTER:** He can't bring himself  
6 to say that I'm right. But that's okay.

7 **MR. PLACITELLA:** I said you're right  
8 many times today.

9 **MR. ASSAF:** So the second procedural  
10 issue, your Honor, is the procedure here. And I  
11 think the last 25 to 35 minutes of the slides that  
12 Mr. Placitella now identifying documents, I'm pretty  
13 sure he said one of the reasons -- the primary reason  
14 he was doing that was because of the whole Samson  
15 order. And he had just -- he had asked for Samson to  
16 be reviewed and then the Samson order intervened.

17 And, your Honor, I don't think that's  
18 correct with the record. I think on January 15th at  
19 the hearing, and we'll put on the record the colloquy  
20 from page 176 to 182, we had this very discussion  
21 about the identification of documents.

22 And Mr. Placitella told you at that time  
23 that he did not identify the documents because I  
24 didn't think that's what you wanted, you, Justice.

25 And you said: I don't know where you

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1 got that from.

2 There is no mention that, oh, well,

3 Samson, I'm just referring back to Samson.

4 He filed this motion without identifying  
5 documents. And his point then, at least a month ago,  
6 was he did it because he didn't think that's what you  
7 wanted.

8 **SPECIAL MASTER:** Well, the record is  
9 what the record is. And the applicable legal  
10 standards are what the applicable legal standards  
11 are. So can we dovetail there?

12 **MR. ASSAF:** And we are. I'm going to  
13 turn that over to Mr. Bress now.

14 But the last procedural point on the  
15 legal standard, just so I understand it clearly, is  
16 that plaintiffs' law firm is going to provide to BASF  
17 and your Honor a listing of the 61 documents that  
18 they believe satisfy a prima facie case in  
19 furtherance of a crime or a fraud.

20 **SPECIAL MASTER:** No, it's more than  
21 that. It's 61 plus the ones from the Cahill  
22 compilation that they claim, number 1, satisfy the  
23 prima facie -- or assist in satisfying the prima  
24 facie burden they must meet, and secondly are the  
25 documents for which they are seeking disclosure.

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1                   Okay. So that it's not this incredibly  
2 large universe out there. It's actually fairly  
3 limited, given the number of documents in this case.

4                   And as counsel already know, I mean,  
5 I've done privilege reviews on more than 61 documents  
6 already. And you can ask Mr. Reiley, who had to take  
7 my gibberish and turn it into redacted documents.

8                   **MR. ASSAF:** Okay. So that's -- I'm glad  
9 for clarification on that.

10                  And I will now turn it over to Mr.  
11 Bress, who's going to address the legal standards and  
12 continue the argument.

13                  **SPECIAL MASTER:** Mr. Bress?

14                  **MR. BRESS:** Thank you, your Honor. Dan  
15 Bress with Kirkland & Ellis for BASF.

16                  Your Honor, obviously on behalf of us,  
17 on behalf of our client, our general counsel who's  
18 here today, we appreciate you holding the hearing.  
19 We appreciate --

20                  **SPECIAL MASTER:** Don't appreciate  
21 holding the hearing. It's what we're supposed to do.

22                  **MR. BRESS:** And I was also going to say  
23 we appreciate the care and attention you're obviously  
24 giving to this significant motion.

25                  **SPECIAL MASTER:** Just so that you know,

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1 one of my favorite comics is Chris Rock.

2 **MR. BRESS:** I enjoy him as well.

3 **SPECIAL MASTER:** Right answer. And he  
4 has a great routine from very early on in his career  
5 about people taking care of their kids. And he's  
6 paraphrasing these guys saying: Well, I take care of  
7 my kids, I do this, I do that, I do the other.

8 And his response was: What do you want,  
9 a cookie? That's what you're supposed to do. Okay.

10 So we have cookies. But you don't get  
11 it for doing your job. You get it because having  
12 cookies is good.

13 So please, I could have said no -- well,  
14 I probably couldn't have said no to Chief Judge  
15 Linares when he called me. But that's why I'm here.

16 **MR. BRESS:** Thank you, your Honor. We  
17 appreciate that.

18 Your Honor, the fundamental submission I  
19 want to make to you today is that if the proper legal  
20 standards are actually applied to the motion that the  
21 plaintiffs filed, that motion fails.

22 **SPECIAL MASTER:** Okay. Is the standard  
23 any different than I just articulated to Mr. Assaf?

24 **MR. BRESS:** So here are the key  
25 elements. You have to identify documents that are in

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1 furtherance of a crime or fraud. And the in  
2 furtherance of standard has real meaning.

3 There was some allying of what that  
4 standard actually means. And I think it's very  
5 important to crystallize what it actually does  
6 include and what it doesn't include.

7 But the documents have to be in  
8 furtherance of a crime or fraud. There has to be  
9 client's wrongful intent. This is another  
10 significant point that I think was much allied in the  
11 presentation you heard.

12 **SPECIAL MASTER:** Let me take you back to  
13 the prior element --

14 **MR. BRESS:** Sure.

15 SPECIAL MASTER -- which the in  
16 furtherance of. What do you say in respect of  
17 plaintiffs' argument that under the New Jersey  
18 statute it's in aid of and not in furtherance of and  
19 does that make a difference?

20 **MR. BRESS:** Your Honor, I would say  
21 exactly what you said before, which is that in aid of  
22 means in furtherance of.

23 The in furtherance of standard has  
24 existed in the common law for the better part of a  
25 120 to 150 years. There are case after case after

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1 case that say the standard is in furtherance of, in  
2 distinction to two other standards that proponents of  
3 the crime fraud exception have often argued for,  
4 which is the documents merely have to be related to  
5 or they have to be evidence of a fraud.

6 I think that when you look at what the  
7 plaintiffs are arguing, it appears today they  
8 accepted the in furtherance of standard.

9 I can tell you when you read their  
10 brief, they have been strenuously opposing the in  
11 furtherance of standard.

12 And as your Honor knows, we've been at  
13 this for a long time, not just here.

14 The distinction between the these three  
15 standards, in furtherance of, related to, and  
16 evidence of, matters massively.

17 In aid of is in furtherance of. In aid  
18 of is an active term. It means advance, just like in  
19 furtherance means.

20 And how do we know that in the context  
21 of New Jersey law? We know it from the Fellerman  
22 case.

23 We have six slides, your Honor, so that  
24 I think gives you some indication --

25 **SPECIAL MASTER:** Including the cover

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1 slide or --

2 **MR. BRESS:** Seven slides.

3 **SPECIAL MASTER:** Okay.

4 **MR. BRESS:** Ronny, if you could pull up  
5 slide 4, this is the New Jersey Supreme Court quoting  
6 at the top the in aid of language and then after the  
7 block quote construing it to mean in furtherance of.

8 In furtherance of means in aid of. When  
9 that statute was passed in 1960, New Jersey had a  
10 crime fraud exception for the better part of probably  
11 70 to 80 years based on the reported cases. And the  
12 understanding always was a more active commission of  
13 a fraud in furtherance of.

14 And you have the Third Circuit, your  
15 Honor, that has said the exact same thing. And we  
16 can turn to slide 1, which is *In re: Grand Jury*  
17 *Subpoena from the Third Circuit, 2014*. In  
18 delineating the connection required between the  
19 advice sought and the crime or fraud, we have  
20 repeatedly stated that the legal advice must be used  
21 in furtherance of the alleged crime or fraud. We  
22 have rejected the more relaxed related to standard  
23 and explained that the legal advice must give  
24 direction for the commission of future crime or  
25 fraud.

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1                   And what you see repeatedly in the case  
2 law is the client has to be intending the crime or  
3 fraud at the time of the communication.

4                   **SPECIAL MASTER:** Can I ask you though --

5                   **MR. BRESS:** Sure.

6                   **SPECIAL MASTER:** -- is In re: Grand Jury  
7 Subpoena interpreting the New Jersey statute?

8                   **MR. BRESS:** It is not, your Honor. But  
9 if you go again to slide 4, we have Fellerman, the  
10 New Jersey Supreme Court interpreting the New Jersey  
11 statute treating in furtherance of and in aid of as  
12 the same thing.

13                  And if you look at the next slide, which  
14 is a case called Sunshine Biscuits from the Appellate  
15 Division, here I would say the in furtherance of --  
16 obviously you see the phrase in furtherance of, but  
17 actually when you look at the case, you can see the  
18 work that the standard is doing, because in that case  
19 at time one you have in an in-house counsel who  
20 drafts a memo that says there was no contract between  
21 the plaintiff and the defendant.

22                  Fast-forward three years. There's  
23 litigation over this issue. And the defendant takes  
24 the legal position that there was no contract.  
25 Meanwhile, this in-house clearly privileged memo gets

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1 produced inadvertently. And the plaintiff sees it  
2 and says: Aha, you've been lying to me. In fact,  
3 there was a contract and you said in this privileged  
4 memo that there was a contract.

5 What the Appellate Division says is that  
6 document is not discoverable under the crime fraud  
7 exception because it doesn't suggest that the  
8 development of false information or facts. And it  
9 goes on to say it's not discoverable even though this  
10 affirmative defense is arguably inconsistent with the  
11 legal position embodied in the memo.

12 And the reason why I put this up and why  
13 it's so significant is that if the legal standard  
14 were related to, the in-house counsel's memo was  
15 clearly related to this later allegation of fraud.

16 **SPECIAL MASTER:** But plaintiffs haven't  
17 argued related to. They have not argued --

18 **MR. BRESS:** I would submit they --

19 **SPECIAL MASTER:** Not in those terms.  
20 They have argued that in aid of is far broader than  
21 in furtherance of and therefore it is a larger  
22 catch-all than just in furtherance of.

23 Isn't that really what they've argued?

24 **MR. BRESS:** Well, I can't say I have  
25 that clarity on what they argued, because in their

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1 opening brief they said the standard is not in  
2 furtherance of. I don't think they identified what  
3 they thought the standard actually was.

4 **SPECIAL MASTER:** Agreed.

5 **MR. BRESS:** Then when you get to the  
6 reply brief, they say it's not in furtherance of,  
7 it's in aid of.

8 But, your Honor, there is not a single  
9 case that I'm aware of that has said in aid of means  
10 something different than in furtherance of.

11 And the in aid of formulation, which was  
12 enacted in New Jersey law in 1960, is based on a set  
13 of model evidentiary rules that were developed in the  
14 50s. And some states do have the language aid of.

15 And I'm not aware of and plaintiffs  
16 certainly haven't cited any case that said that aid  
17 of means something different than in furtherance of.

18 But to your point on the related to,  
19 when Mr. Placitella puts up a slide that says here  
20 are the documents on the privilege log that have the  
21 word Martin in it, therefore you should review them  
22 in camera, that at best is a related to analysis.  
23 That's all it is, because there's no suggestion that  
24 any of those documents are in furtherance of, much  
25 less that they reflect the client's intent to have a

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1        crime or fraud be committed by their lawyers.

2                      But going back to Sunshine Biscuits,  
3        your Honor, I think if the standard was related to,  
4        that document should have been produced. And  
5        certainly if the standard was evidence of, the  
6        document definitely should have been produced,  
7        because clearly the earlier in-house counsel's memo  
8        was some evidence of this supposed later fraud.

9                      And what you heard Mr. Placitella argue  
10      today was what the crime fraud exception covers is  
11      essentially the truth that proves the lie.

12                     That's not how the crime fraud exception  
13      works. The crime fraud exception is a much more  
14      circumscribed, articulated exception with  
15      specifically defined elements.

16                     One of those is you must have  
17      demonstrated a key timing component, which is that at  
18      the time of the communication the clients intended to  
19      misuse legal services in furtherance of a crime or  
20      fraud.

21                     I don't think, although the plaintiffs  
22      seem to be finally acknowledging that perhaps the  
23      standard is in furtherance of, there is a reason why  
24      the plaintiffs did not argue in their brief that  
25      that -- they didn't embrace the standard that

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1 literally hundreds of courts have adopted. They  
2 didn't embrace the standard that the New Jersey  
3 Supreme Court has articulated and that the Appellate  
4 Division here applied, because I think they have to  
5 realize that there are not -- there is not a good  
6 faith basis to argue that any of the documents on the  
7 privilege log are in furtherance of a crime or fraud.

8                   And this is, by the way, your Honor,  
9 part of the prima facie case. We can go to slides 2  
10 and 3. I've put up here Chevron. And if you look,  
11 your Honor, it's talking about the prima facie case  
12 and the key element number 2, the attorney/client  
13 communications were in furtherance of that alleged  
14 crime or fraud.

15                   And if you look at the next slide, your  
16 Honor --

17                   **SPECIAL MASTER:** Well, again, let me  
18 take you back to that.

19                   **MR. BRESS:** Sure.

20                   **SPECIAL MASTER:** Chevron did not apply  
21 the New Jersey statute.

22                   **MR. BRESS:** Well, but this, your Honor,  
23 I think is --

24                   **SPECIAL MASTER:** That's a yes or no.

25                   **MR. BRESS:** Yes, it did not.

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1 **SPECIAL MASTER:** Okay.

2                           **MR. BRESS:** But I was about to respond  
3 that it doesn't make a difference, because I don't  
4 think the Third Circuit law on the crime fraud  
5 exception is any different than the New Jersey law.

23                           **MR. BRESS:** Yes, that is their argument.  
24 But the point I want to work up here with, your  
25 Honor, is that that argument is clearly not correct.

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1                   And the reason I say that is because  
2 there is no basis to believe that New Jersey alone  
3 among every state in the country, alone among every  
4 federal circuit court of appeal somehow has a  
5 different standard for the crime fraud exception.

6                   I don't think that's borne out in any  
7 New Jersey case. I think it's contradicted by the  
8 New Jersey cases. It's contradicted by Fellerman,  
9 which equates the two, much as your Honor did. And I  
10 think dictionaries and legal thesauruses would show  
11 us the same thing. And it is contradicted by  
12 Sunshine Biscuit. And there are other cases as well  
13 that use the phrase in furtherance of.

14                  But the point I also want to make, your  
15 Honor, is that I think this is a question for today.  
16 It's not a question for later. It's a question for  
17 today because to state a prima facie case you need to  
18 be able to put forward evidence that would be  
19 sufficient to meet the actual elements of the crime  
20 fraud exception.

21                  And the problem I have with plaintiffs'  
22 submission is that they're seeking to avoid what is a  
23 central element here, which the in furtherance of  
24 test.

25                  And I don't see how you can state a

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1 prima facie case when you misarticulate the legal  
2 standards that apply and then when you don't put  
3 forward the proof that would sustain the actual legal  
4 requirements.

5 So in our view, the in furtherance of  
6 standard is -- in aid of, in furtherance of, it's the  
7 same thing, and that by not embracing that standard  
8 and explaining how it could be met and by not  
9 identifying any particular documents that would be  
10 met under the standard, the prima facie case fails.

11 **SPECIAL MASTER:** Okay. But Mr.

12 Placitella at one point conceded that even if you  
13 applied the in furtherance of standard, there is more  
14 than enough in this record to satisfy the prima facie  
15 showing that they are required to do so.

16 And in order to demonstrate that, he  
17 marshaled a whole bunch of facts. Now, of course,  
18 interpreting them in the light most favorable to  
19 him -- I shouldn't say to him -- to his clients. But  
20 he did marshal a whole bunch of facts.

Now, whether those facts deserve the interpretation that is being advanced or they deserve some other different interpretation is something that we're going to have to address at some point or another.

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1                   But isn't it fair to say that based upon  
2 the entire presentation that's been made, that at the  
3 very least there's been a sufficient showing by a  
4 fair preponderance of the evidence that there is a  
5 reasonable basis, a reasonable factual basis for a  
6 good faith belief that the exception would apply?

7                   Which then takes us to step 2, which is  
8 the actual in camera ex parte review of the documents  
9 themselves.

10                  **MR. BRESS:** Let me respond. I don't  
11 think that's correct. And I think here are the  
12 reasons why.

13                  The presentation that you saw this  
14 morning, and Mr. Farrell is going to respond  
15 point-by-point to some of these slides and I think  
16 you're going to see a somewhat different version of  
17 the facts than you heard this morning. But set that  
18 aside.

19                  What Mr. Placitella came forward with  
20 was evidence that he believes shows a fraud.

21                  What the cases say is that a showing of  
22 fraud, even a compelling one, is not enough to  
23 satisfy the crime fraud exception. Simply because  
24 you plead a fraud or even if you prove a fraud in  
25 front of a jury doesn't mean you then get to take the

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1 privileged documents. This is a completely separate  
2 inquiry.

3 And so I think at most --

4 **SPECIAL MASTER:** But let's deal with  
5 that. Let us say for purposes of argument that the  
6 plaintiffs have established the existence of a fraud  
7 or a crime. Okay.

8 **MR. BRESS:** We disagree, but I'll accept  
9 the premise.

10 **SPECIAL MASTER:** I expect no less from  
11 you. But let's assume for the sake of argument that  
12 the plaintiffs have established a *prima facie* case  
13 that a crime or fraud has been committed.

14 They then point to a number of  
15 communications that in their view were -- and I'm  
16 going to use what I think is the correct  
17 nomenclature -- that were in furtherance of the crime  
18 or fraud.

19 And they then say that based upon their  
20 proofs, which they claim are actually greater than by  
21 a fair preponderance of the evidence, that the second  
22 stage needs to be addressed, which is the actual  
23 review of the documents themselves.

24 I'm not going to go into the and you  
25 should be able to review the documents themselves to

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1 establish the prima facie case because that strikes  
2 me as putting the cart before the horse.

3 **MR. BRESS:** That's not correct, yes.

4 **SPECIAL MASTER:** But what's wrong with  
5 that?

6 **MR. BRESS:** So I think there are several  
7 things that are wrong with it. We haven't even  
8 identified what fraud we're talking about here. I  
9 don't think that based on the submission we have seen  
10 today --

11 **SPECIAL MASTER:** I can tell you what  
12 fraud has been identified here.

13 **MR. BRESS:** Well, the point I was going  
14 to make, your Honor, was the spoliation point,  
15 because I really do think that has to be off the  
16 table at this point when what was put forward in an  
17 opening brief were allegations of document  
18 destruction and the Hemstock, quote/unquote, purge  
19 memo that doesn't actually call for the destruction  
20 of documents.

21 We responded to this allegation of fraud  
22 by saying: How can you allege and claim you should  
23 be entitled to our privileged documents based on  
24 spoliation when you haven't identified any document  
25 that was destroyed or missing, which is what led to

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1 Appendix C, which we have had no opportunity to  
2 respond to.

3 And so if we're are talking about the  
4 misstatements, I understand the -- I understand your  
5 Honor's point. I don't think that spoliation issue  
6 has been properly set up in front of your Honor.

7 But to get back to --

8 **SPECIAL MASTER:** Well, let's not go too  
9 far off of that. Are you okay if you're allowed a  
10 reasonable opportunity to respond to the spoliation  
11 arguments?

12 **MR. BRESS:** Your Honor, I think that if  
13 there's going to be further proceedings in the case,  
14 there's going to need to be further submissions to  
15 your Honor, and part of that would include --

16 **SPECIAL MASTER:** Is that a yes?

17 **MR. BRESS:** Yes. Clearly, yes.

18 **SPECIAL MASTER:** All right. I know it's  
19 your way of arguing. But for me it's a lot more  
20 helpful if you give me the conclusion up front and  
21 then do the argument.

22 So if I ask you a question that's a yes  
23 or no question, you can say yes and then continue.  
24 But at least I know -- or no. At least I know how to  
25 cabin in what you're saying to me.

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1                   **MR. BRESS:** Yeah, I apologize.

2                   **SPECIAL MASTER:** Don't bury the lead.

3                   **MR. BRESS:** It was so obvious to me that  
4 the answer was yes. But yes.

5                   **SPECIAL MASTER:** I'm not that smart.

6 So you have to help me here.

7                   **MR. BRESS:** Yes a thousand times. But  
8 I still, your Honor, don't think that really remedies  
9 the situation, because here we're talking about a  
10 prima facie case. All we have to go on is the  
11 plaintiffs' showing. And if the plaintiffs in their  
12 reply brief made -- essentially sandbagged us with 45  
13 pages of briefing that we didn't have a chance to  
14 respond to --

15                  **SPECIAL MASTER:** And I cured the  
16 sandbagging. So what's your complaint? If I cure  
17 the sandbagging, you don't have a complaint.

18                  **MR. BRESS:** Well, I think what would  
19 happen then, your Honor, is we should be allowed to  
20 respond to that before your Honor makes a  
21 determination on the prima facie case.

22                  **SPECIAL MASTER:** I should think so.

23                  **MR. BRESS:** Yeah.

24                  **SPECIAL MASTER:** As much as I don't like  
25 it, I should think that that would be -- I think

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1       that the plaintiffs have a choice to make. They  
2       have a choice to either withdraw their spoliation  
3       arguments and allow me to decide this on the record,  
4       or they can maintain their spoliation arguments,  
5       which means that you will get the opportunity to  
6       respond. They will not get an opportunity to reply.  
7       It will be in the nature of a sur-reply, which the  
8       rules are not in favor of, but I'd be happy to  
9       give -- if that's the case, be happy to give to you  
10      leave to respond to a 44 page appendix to a brief  
11      that, if folks haven't noticed, I'm a little annoyed  
12      at. I don't think that that's how things should be  
13      done.

14                 If you wanted to file a 44 page brief on  
15       spoliation, all you had to do was ask. I haven't  
16       turned anybody down on anything to this point.

17                 So those are the choices it strikes me.  
18       Either they can withdraw their spoliation claims.  
19       Then there's nothing for respond to. Or they can  
20       maintain their spoliation claims, at which point BASF  
21       and Cahill will be given the opportunity, a  
22       meaningful opportunity to reply. And then I'll rule.

23                 **MR. BRESS:** I guess I would say, your  
24       Honor, there's to me a third option, which is just  
25       simply to disregard the --

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1                           **SPECIAL MASTER:** I'm not going to do  
2                           that.

3                           **MR. BRESS:** -- improper reply.

4                           **SPECIAL MASTER:** I'm not going to do  
5                           that. That's not an option in my book. This is far  
6                           too important a motion for me to do that. I don't  
7                           think I would be meeting my obligations here to the  
8                           Court if I were to do that.

9                           **MR. BRESS:** I understand and respect  
10                          that position, your Honor. I guess my reaction to it  
11                          is I think it's a position the plaintiffs put you in  
12                          by not following the proper approach to making a  
13                          prima facie case.

14                          And I think that to have to argue it --  
15                          we appreciate the opportunity to file a further  
16                          brief. If that's where it goes, we will do that.

17                          But point of today was to be able to  
18                          evaluate the plaintiffs' prima facie case as based on  
19                          the papers. And I think we're at a disadvantage by  
20                          not having those responses for --

21                          **SPECIAL MASTER:** Let me interrupt you  
22                          for a moment.

23                          Mr. Placitella, what choice do you want?

24                          **MR. PLACITELLA:** I would consult with my  
25                          brethren here before --

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1                   **SPECIAL MASTER:** Why don't you do that  
2 right now. Take a minute and do that. I'm concerned  
3 that you may turn into a pumpkin on me.

4                   **MR. PLACITELLA:** No, I'm good. I took  
5 care of it.

6                   **SPECIAL MASTER:** Let's get it done.  
7 We'll go off the record for a minute.

8                   (Break.)

9                   **SPECIAL MASTER:** Are we ready?

10                  **MR. ROTH:** Yes, your Honor.

11                  **SPECIAL MASTER:** Mr. Placitella, you got  
12 something to report?

13                  **MR. PLACITELLA:** Yeah, we had a --

14                  **MR. ROTH:** Well, I think -- I'm not sure  
15 what your last question was, your Honor. I think you  
16 said are we dropping the spoliation claim --

17                  **SPECIAL MASTER:** My last question was  
18 are you ready to proceed?

19                  **MR. ROTH:** Before we went off the  
20 record, your Honor.

21                  **SPECIAL MASTER:** The choice is simple.  
22 Either withdraw your spoliation issue or agree to the  
23 filing of a sur-reply brief.

24                  **MR. ROTH:** So we will agree to the  
25 filing of the sur-reply brief.

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1 **SPECIAL MASTER:** Okay.

2                           **MR. ROTH:** And perhaps there's an issue  
3 to be framed here based on the argument especially as  
4 it relates to the crime fraud that we've heard today.

5 Perhaps after everybody's done, I'll  
6 have an opportunity to address that, rather than  
7 interrupt.

8                           **SPECIAL MASTER:** I don't understand that  
9 at all.

10                           **MR. ROTH:** Yeah, I've been doing that to  
11 everyone here.

12                           **SPECIAL MASTER:** Well, that should tell  
13 you something.

14                           **MR. ROTH:** For purposes of whether we've  
15 established a prima facie case for the crime fraud,  
16 we've identified evidence, even in the publicly  
17 non-privileged arena, evidence that was concealed  
18 from plaintiffs in their underlying cases that the  
19 defendants Cahill and Engelhard knew about.

20 You and Mr. Placitella had a discussion  
21 about is that spoliation if they were destroyed or  
22 not destroyed.

23 And for purposes of crime fraud prima  
24 facie case, it doesn't matter whether they were  
25 destroyed or not. They were concealed and not

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1 available, which your Honor defined as spoliation.

2 And we agree that for purposes of this  
3 motion that was spoliation.

4 Where we get to the appendix that we  
5 filed, and I can't remember, Judge, how many pages it  
6 was --

7 **SPECIAL MASTER:** It's 44, just in case  
8 you forgot.

9 **MR. ROTH:** We were responding to an  
10 assertion in a reply brief that said: You never  
11 identified documents that were destroyed. There are  
12 other reasons why that may be relevant in this case.

13 There was talk before about Rosenblit  
14 damages. And there was an argument to be made that  
15 the fact that some of those documents have been found  
16 or could be found show that they could have been made  
17 available to the plaintiffs in the underlying cases.

18 But those in our view are two distinct  
19 elements of this lawsuit.

20 But for purposes of the crime fraud  
21 argument, I think we've established spoliation in  
22 terms of the documents that are concealed.

23 Appendix C, however, we don't want to  
24 run the risk -- sorry. Appendix E, the 44 page one.  
25 Sorry. We didn't want to run the risk of waiving any

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1 claim by saying no, we're not pursuing spoliation  
2 when, as we've discussed, it's an important part of  
3 our *prima facie* showing.

4 So it is confusing. I don't know  
5 whether I've made matters clearer. But you've asked  
6 for an answer and we said, yeah, we'll accept the  
7 sur-reply.

8 **SPECIAL MASTER:** Okay. What's that do  
9 for you, Mr. Bress? You good?

10 **MR. BRESS:** Yes. We will submit a  
11 sur-reply, your Honor, and then --

12 **SPECIAL MASTER:** Can you tell me by  
13 when?

14 **MR. BRESS:** We would like three weeks on  
15 the sur-reply. And we would like 60 pages.

16 **SPECIAL MASTER:** I'm sorry?

17 **MR. BRESS:** We'd like 60 pages and three  
18 weeks.

19 **MR. PRATTER:** We had 44 pages. Where do  
20 they get 60?

21 **SPECIAL MASTER:** Well, because they  
22 asked for it. You didn't. You asked for 35 and  
23 gave me a hundred.

24 **MR. BRESS:** Your Honor, I can explain to  
25 you why.

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1                           **SPECIAL MASTER:** Mr. Bress, you don't  
2 have to explain why. I assume that any lawyer t who  
3 makes that request does it in a good faith basis and  
4 has a reason for it. So we're talking about --

5                           **MR. GUSSACK:** Your Honor, may I have a  
6 moment to confer with my co-counsel as to timing?

7                           **SPECIAL MASTER:** Sure.

8                           **MS. GUSSACK:** As you can appreciate,  
9 we're a little bit newer. And I want to make sure  
10 three versus four weeks, which makes sense for us.  
11 If I might have a minute.

12                          **SPECIAL MASTER:** Absolutely.

13                          **MR. GUSSACK:** Thank you.

14                          **SPECIAL MASTER:** The only thing I have  
15 to give folks a heads-up is I'm going to be out part  
16 of April and may fly into May. I'm having a medical  
17 procedure done that I just found out I'm going to be  
18 out of commission for two weeks. I did not expect  
19 that. And it's going to be sometime in April. And  
20 I'd like to get this done before that. So if you  
21 could bear that in mind.

22                          But, Miss Gussack, please do talk to  
23 these folks and come up with a date.

24                          **MR. GUSSACK:** Thank you.

25                          **MR. PLACITELLA:** I want to be heard on

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1 the date before they...

2                   **MR. BRESS:** Your Honor, if it would be  
3 okay with the Court, we would suggest March the 21st.

4                   **SPECIAL MASTER:** March the 21st, that's  
5 a Wednesday. March the 21st it is.

6                   **MR. PLACITELLA:** Could I be heard on  
7 this, your Honor?

8                   **SPECIAL MASTER:** Yes. But I'm not going  
9 to pay much attention to it.

10                  **MR. ROTH:** I know that.

11                  **SPECIAL MASTER:** Okay. This is  
12 something of your own making as far as I'm concerned,  
13 Mr. Placitella.

14                  **MR. PLACITELLA:** Well, okay.

15                  **SPECIAL MASTER:** But whatever you want  
16 to tell me, I'll be happy to listen to it.

17                  **MR. PLACITELLA:** If that's how it's  
18 going to get extended as the Court suggests, then  
19 we're going to have to have a conversation about the  
20 discovery end date, because a lot of what was going  
21 to transpire may be impacted by that. That's my  
22 point.

23                  **SPECIAL MASTER:** I appreciate that, that  
24 there might be. What I'm going to suggest to you is  
25 don't let it, the best you can. If it does, come

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1 back to me and we can talk.

2                   But I will tell you that my uninformed  
3 reaction is no, it's not going to affect the  
4 discovery end date.

5                   I don't hear the defense saying that  
6 they need the discovery end date extended. And the  
7 need for this sur-reply was the result of plaintiffs'  
8 actions.

9                   So, you know, you don't get to kill your  
10 parents and then seek clemency because you're an  
11 orphan.

12                  You wanted how many pages?

13                  **MR. BRESS:** 60, your Honor.

14                  **SPECIAL MASTER:** Do you need 60?

15                  **MR. BRESS:** I believe we do in these  
16 circumstances.

17                  **SPECIAL MASTER:** You do know I read each  
18 one, right?

19                  **MR. BRESS:** I've seen evidence of that,  
20 your Honor.

21                  **SPECIAL MASTER:** I'm not getting my  
22 younger either. Any appendices you want you to do?  
23 No appendices?

24                  **MR. BRESS:** Your Honor, I think everyone  
25 here has probably heard your directive on appendices.

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1                   **SPECIAL MASTER:** Okay. So you get  
2 until March 21st. Is this going to be a consolidated  
3 brief between Cahill and BASF or --

4                   **MS. GUSSACK:** No, your Honor.

5                   **SPECIAL MASTER:** -- are you going to do  
6 separate?

7                   **MR. GUSSACK:** Separate, your Honor.

8                   **SPECIAL MASTER:** Okay. Miss Gussack,  
9 do you also want 60 pages?

10                  **MR. GUSSACK:** I'd like to bring it in  
11 under 60, your Honor.

12                  **SPECIAL MASTER:** I know you would.

13                  **MS. GUSSACK:** But I'll hold it at 60 for  
14 now.

15                  **SPECIAL MASTER:** Okay. So does that  
16 help you there, Mr. Bress?

17                  **MR. BRESS:** Yes, I think we have that  
18 issue resolved, your Honor.

19                  **SPECIAL MASTER:** Okay. And I know I  
20 kind of cut you off in the middle of your  
21 presentation. Is there something else that you'd  
22 like to bring to my attention?

23                  **MR. BRESS:** Your Honor, I want to --  
24 where we began this part of the conversation was  
25 comments that you made to the effect that you have

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1   seen a lot of facts put up on the screen, isn't that  
2   enough for a prima facie case? I responded on the  
3   spoliation piece. We've now bracketed that to the  
4   side.

5                 But I want to come back to your Honor's  
6   question and make a few additional points in response  
7   to that, because I don't believe that what you saw  
8   today does satisfy the legal requirements for a prima  
9   facie case.

10                There's two key points I want to make,  
11   your Honor, in why there's a deficiency. The first  
12   one is the failure to identify specific documents  
13   that were subject to the crime fraud exception.

14                **SPECIAL MASTER:** I've cured that.

15                **MR. BRESS:** I don't think so, your  
16   Honor.

17                **SPECIAL MASTER:** Why not?

18                **MR. BRESS:** A few reasons.

19                **SPECIAL MASTER:** I've got an Appendix C  
20   that has all sorts of Bates numbered documents that I  
21   asked counsel and they said do two things. Number 1,  
22   they are the documents that they assert assist in  
23   proving their prima facie case.

24                And secondly, they are the documents  
25   that they want disclosure on -- or in respect of

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1 which they want disclosure on, that universe.

2 So why do I need -- other than at some  
3 point, if it becomes relevant, I may ask you folks to  
4 produce those documents to me ex parte so I can make  
5 a determination. But that's only after I get past  
6 the *prima facie* burden.

7 So what more do I need to know?

8 **MR. BRESS:** Your Honor, the central  
9 problem with Appendix C is that all it does is list a  
10 set of Bates numbers.

11 There has been no showing at all as to  
12 how any particular document is in furtherance of a  
13 crime or fraud. And that's the legal standard that  
14 governs here.

15 **SPECIAL MASTER:** How do they do that if  
16 they don't have access to the documents?

17 **MR. BRESS:** They do it with  
18 non-privileged evidence, your Honor. In these cases  
19 what people need to come forward with is an  
20 explanation.

21 There were privileged logs that were  
22 flashed up very briefly that we haven't even had the  
23 opportunity to respond to. That was the attempt, not  
24 Appendix E but C.

25 But the last 10 slides we saw where

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1 there were red boxes around privilege log entries and  
2 certain subject matter, that was an attempt to try to  
3 satisfy the relevant legal standard to show that  
4 there are particular communications that are in  
5 furtherance of the crime or fraud.

6                   But when you look at those  
7 communications, your Honor, and I think you pointed  
8 this out, there are communications that are purely  
9 internal to Cahill. There are communications from  
10 all sorts of different time periods.

11                  **SPECIAL MASTER:** Well, that doesn't mean  
12 that it's not a Cahill lawyer telling another Cahill  
13 lawyer: Hey, guys, this is how we can really screw  
14 all these plaintiffs.

15                  We don't know that, do we?

16                  **MR. BRESS:** But what we do know, your  
17 Honor, is that on the face of the privilege log there  
18 is no Engelhard in-house person listed.

19                  **SPECIAL MASTER:** Why does there need to  
20 be an Engelhard in-house person listed --

21                  **MR. BRESS:** Because --

22                  **SPECIAL MASTER:** -- if you've got  
23 Engelhard's agent talking to another one of  
24 Engelhard's agents saying: Hey, these are the things  
25 that we can do where we can hide the ball on all of

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1       these plaintiffs who have no clue that this stuff is  
2       like really bad for them, but we're not going to tell  
3       them about it.

4                   So what? Why isn't that subject to the  
5       exception?

6                   The problem I have with your argument is  
7       it is almost a Major-Major problem from Catch-22.  
8       You know, I only talk to you in my office but I'm  
9       never in my office.

10                  How do they prove the contents of the  
11      document if they don't have access to the contents of  
12      the document?

13                  **MR. BRESS:** Your Honor, let me respond,  
14      because I think this is reviewing a fundamental  
15      disconnect between what the plaintiffs are asking and  
16      what the crime fraud exception is about.

17                  The crime fraud exception is not about  
18      whether Cahill made misstatements to litigants.

19                  The crime fraud exception as applied to  
20      these factual circumstances is whether the client,  
21      Engelhard and later BASF, intended for its outside  
22      counsel to make misstatements in litigation.

23                  The fact of a misstatement in a  
24      litigation does not trigger the crime fraud  
25      exception.

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1                           **SPECIAL MASTER:** Okay. But let me then  
2 change the hypo. The hypo then becomes a memo from  
3 someone at Cahill to someone else at Cahill -- I'm  
4 not saying this happened. Just hypothetically.

5 Someone from Cahill saying to somebody else at Cahill  
6 saying: I just got off the phone with John Doe from  
7 Engelhard and our instructions are that we are to  
8 deep-six all this information about asbestos and we  
9 are to represent to whomever it is that there is no  
10 evidence of any asbestos anywhere in this universe.

11                          Okay. Doesn't that -- but in order to  
12 get to that, don't I have to see what the document  
13 says?

14                          **MR. BRESS:** No, because otherwise there  
15 would be a prima facie case in every single case.

16                          **SPECIAL MASTER:** But that's separate and  
17 apart from whether they've made a prima facie case.

18                          Their prima facie case is -- I guess the  
19 distinction -- the disconnects that you and I are  
20 having is the distinction between direct and  
21 circumstantial evidence.

22                          You're looking for direct evidence to  
23 satisfy the prima facie case. I'm looking at the  
24 establishment of the prima facie case no matter  
25 whether the evidence is direct or circumstantial.

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1                   And the presentation that Mr. Placitella  
2 made was largely circumstantial, but it did have some  
3 direct evidence, because he had -- at least he  
4 pointed out to what he said were statements made by  
5 Mr. Hemstock, by -- I'm sorry, Dr. Hemstock, Mr.  
6 Gale, Dr. Glassley, that all led you to the  
7 conclusion that whatever the representations may have  
8 been, they were incorrect, that in fact there was  
9 asbestos in this talc based upon their review of it.

10                  And we know objectively that BASF  
11 through its counsel made representations to the world  
12 at large that the Emtal talc did not contain asbestos  
13 and that there was no proof that it did or it didn't.

14                  Well, the plaintiffs' job is almost  
15 impossible, because they have to prove a negative.  
16 And the only way you can prove the negative is by  
17 proving the absence of the positive, which is always  
18 circumstantial.

19                  So I'm not on the same page as you,  
20 because I'm looking at what the plaintiffs have  
21 presented through a very different prism than you  
22 are, probably a much more -- I'm trying to find the  
23 right word -- indulgent prism than you are.

24                  **MR. BRESS:** So let he respond, your  
25 Honor.

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2                           **MR. BRESS:** I think the problem here is  
3 that the central element of the crime fraud exception  
4 is the client's wrongful intent.

9                   They've now disavowed the allegation  
10          that BASF intended to commit a crime or fraud, which  
11         I clearly think is outrageous. But they're asking  
12         your Honor -- in those 66 documents that they want  
13         your Honor to review, there are documents spanning  
14         the 70s to the late 2000s. There are allegations --  
15         sprawling allegations of fraud being made without any  
16         evidence of what individual people knew and were  
17         aware of.

18 You saw put up on the screen Mr.  
19 Hassett, an in-house lawyer. There is not any  
20 allegation -- they haven't deposed Mr. Hassett. They  
21 haven't done the work to bring to your Honor the  
22 non-privileged record that people do before they  
23 bring this kind of motion.

24 And the reason they haven't done that  
25 work, your Honor, is because they were banking on the

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1       Samson results.

2                   And that is why this crime fraud motion  
3       wasn't even filed until your Honor prompted the  
4       plaintiffs to file a class motion, to which they  
5       responded: Well, we now need to file a crime fraud  
6       motion.

7                   **SPECIAL MASTER:** That's not exactly  
8       correct. They filed a crime fraud motion because I  
9       ordered them to.

10                  **MR. BRESS:** Well --

11                  **SPECIAL MASTER:** That's why they filed.  
12       Otherwise they would not have filed it, or at least  
13       not yet.

14                  **MR. BRESS:** The reason this all came  
15       about at the time it did and not years earlier in  
16       this long-running case is because your Honor directed  
17       the plaintiffs to file a class motion. And they  
18       claimed that as part of the class proceedings they  
19       needed the privileged documents.

20                  And you said to them: Well, if you need  
21       the privileged documents, then --

22                  **SPECIAL MASTER:** Tee it up.

23                  **MR. BRESS:** -- file a motion. But the  
24       whole arc of this was not the plaintiffs going to  
25       depose people on a non-privileged basis and bring the

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1 record to your Honor so that you could try to make a  
2 conclusion that there was a *prima facie* case that the  
3 client intended a crime or fraud.

4                   And I think the time period we're  
5 talking about is enormous. There's an allegation  
6 being made of 30 years' worth of crime or fraud.

7                   And I think you have to break that  
8 period up and look at the different considerations,  
9 because I think these time periods are quite  
10 different.

11                  And let's start with the first one,  
12 which is basically --

13                  **SPECIAL MASTER:** But isn't that your  
14 argument at the *ex parte in camera* portion?

15                  **MR. BRESS:** I don't think so, your  
16 Honor, because I think it goes to the failure to  
17 identify any documents in furtherance of a crime or  
18 fraud or that reflect the client's wrongful intent to  
19 misuse legal services in furtherance of a crime or  
20 fraud.

21                  And if you look at the period from say  
22 the 70s up until the time of Westfall, that's what  
23 I'll what call the first period, when the plaintiffs  
24 claim that misrepresentations were being made to the  
25 customers, that's not true. And Mr. Farrell will

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1 walk through some of that. It is just not accurate.

2                   But let's assume it is accurate. In  
3 what way was a lawyer involved in furthering that  
4 alleged fraud on customers, who by the way, aren't  
5 even plaintiffs in the case?

6                   There is no identification of any lawyer  
7 who was involved in furthering a fraud. Cahill  
8 Gordon didn't even represent BASF in the talc cases  
9 until 1982.

10                  So why are privileged documents on a  
11 privilege log from the 70s -- in the late 70s and the  
12 early 80s at issue?

13                  We don't think there's been any showing,  
14 any evidentiary showing to your Honor that that time  
15 period could be put at issue.

16                  And again, there's the Third Circuit --

17                  **SPECIAL MASTER:** How do I know that  
18 without looking at the documents?

19                  **MR. BRESS:** Your Honor, because there's  
20 not even any evidence put before you that would --  
21 who is -- who are the lawyers involved in  
22 perpetrating a crime or fraud in the late 70s?

23                  The fraud that has been articulated to  
24 your Honor has been Cahill Gordon. The allegation is  
25 that in the late 1980s, when Cahill was defending

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1 cases on behalf of Engelhard, it made misstatements  
2 in litigation.

3 Cahill wasn't even involved in what  
4 happened in the 1970s. They weren't even on the  
5 scene working on talc cases.

6 So what is the evidentiary basis that  
7 would put at issue the client's wrongful intent?

8 And again, we could agree for argument  
9 purposes, although it's not true, that there were  
10 misstatements.

11 Well, all that shows is that somebody  
12 can plead a fraud. I'm talking about the 1970s and  
13 the customer disclosures and the MSDS and things like  
14 that. All that shows is that if somebody wants to  
15 come in and make the argument that those statements  
16 were wrong, they can do that.

17 It's a completely different thing to be  
18 able to bootstrap that into the privileged documents  
19 without any evidentiary basis for the misuse of legal  
20 services during that time period.

21 There's no allegation that lawyers were  
22 involved in perpetrating a wrongful statement to a  
23 customer base.

24 **SPECIAL MASTER:** Well, that's not  
25 entirely correct. There are allegations that

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1       lawyers were involved, because lawyers are party  
2       defendants in this case. They're not party  
3       defendants because of their good looks, charm, and  
4       wit. They're party defendants because it is alleged  
5       they engaged in actions that were improper. Okay.  
6       Not yet proven. Alleged.

7                   And for purposes of trying to pierce the  
8       attorney/client privilege, it is the plaintiffs'  
9       burden to demonstrate by a fair preponderance of the  
10      evidence that there is a reasonable basis to believe  
11      that the actions of the lawyers and the clients were  
12      such that they were engaged in crime or fraud and  
13      therefore the information should not be privileged.  
14      That's what we're facing. Okay.

15                  But to say that there's nothing here  
16      that tells us that there's some underlying  
17      impropriety, well, there are the allegations in the  
18      complaint that are pretty straightforward. There's  
19      the marshaling of the facts that Mr. Placitella  
20      engaged in today.

21                  Now, whether one agrees with him or not,  
22      he does have his theory and he has presented facts  
23      that he believes sustain his theory.

24                  I'm not getting your point. I'm just  
25      not. And maybe I'm just being super-dense.

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1                   **MR. BRESS:** No, I don't think you are,  
2 your Honor, because I think that the catch here is  
3 that in order for the crime fraud exception to apply,  
4 the client has to be intending to misuse legal  
5 services at the relevant time period.

6                   And the point I'm trying to make to your  
7 Honor is that this is not a story that stayed the  
8 same for 30 years by the allegations.

9                   What they are alleging is that in the  
10 late 70s -- in the 70s there were misstatements to  
11 customers. Then there was Westfall. Then there  
12 was a gap in litigation. Then there were  
13 misstatements to litigants. And then there was a  
14 period after that when BASF acquired Engelhard.

15                  And the point I'm trying to make to your  
16 Honor --

17                  **SPECIAL MASTER:** But plaintiffs'  
18 argument is those are all of a whole cloth. They  
19 are not as distinct as you're pointing them out to  
20 be. They're saying this is a pattern and practice  
21 that started in the 1970s and continued until 2009.  
22 That's what they're saying.

23                  And whether the people who were doing it  
24 in 2009 had the same scienter that the people who  
25 started it in 1970 had is to a large degree

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1       irrelevant.

2                          The issue is you have a pattern and  
3       practice, it's been in place, this is why it was in  
4       place, and that therefore we should be entitled to  
5       say the plaintiffs get access to these otherwise  
6       privileged documents. That's their argument.

7                          **MR. BRESS:** Yes, but the problem --

8                          **SPECIAL MASTER:** Not as elegantly said  
9       as Mr. Placitella said it. But that's their  
10      argument.

11                         **MR. PLACITELLA:** That I would say no to.

12                         **SPECIAL MASTER:** Okay. That's not your  
13      argument?

14                         **MR. PLACITELLA:** No, not as eloquently  
15      as you.

16                         **MR. BRESS:** Your Honor, the problem --

17                         **SPECIAL MASTER:** Flattery will get you  
18      everywhere.

19                         **MR. BRESS:** The problem I have with that  
20       framing of this is that there is not evidence that is  
21       going to -- that can be used to support the  
22       application of the crime fraud exception across this  
23       entire period.

24                         We already had Mr. Placitella  
25       acknowledge on the record that after BASF acquired

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1 Engelhard --

2                   **SPECIAL MASTER:** In 2006.

3                   **MR. BRESS:** In 2006, there was no  
4 client's intent. Now --

5                   **MR. PLACITELLA:** I didn't say that.

6                   **MR. BRESS:** Well, if you're going to  
7 make the allegation that BASF intended to commit a  
8 crime or fraud --

9                   **SPECIAL MASTER:** Mr. Bress, talk to me.

10                  **MR. BRESS:** Your Honor, if someone is  
11 going to make the allegation that BASF intended to  
12 commit a crime or fraud, I think they should do so  
13 today with all of us present and identify what the  
14 evidence is, because I can tell you the evidence we  
15 saw was that in a single privilege log in the Paduano  
16 case there was a document that was inadvertently  
17 logged and then, when we realized it was not  
18 logged -- it should not have been logged, it was  
19 produced. Your Honor, that is not a crime or fraud.

20                  And so to make the allegation that BASF,  
21 after it acquired Engelhard, intended to commit a  
22 crime or fraud I think is offensive and incorrect.

23 But the point --

24                  **SPECIAL MASTER:** Am I not obliged though  
25 to give the plaintiff the benefit of all reasonable

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1       inferences on the facts that they've marshaled?

2                   **MR. BRESS:** No, you're not, because  
3       under the crime fraud exception, it's not about  
4       allegations. It's about evidence.

5                   There is no evidence that BASF after it  
6       acquired Engelhard intended to commit a crime or  
7       fraud.

8                   **SPECIAL MASTER:** But that's a  
9       distinction without a difference to me, because BASF  
10      acquired Engelhard. It acquired it with all of its  
11      warts.

12                  **MR. BRESS:** Your Honor, that's a  
13       question of successor liability. It's not a question  
14       of the crime fraud exception. And here's why,  
15       because I think this is a very critical point.

16                  Under the crime fraud exception, the  
17       client has to have the requisite intent at the time  
18       of the legal consultation.

19                  **SPECIAL MASTER:** Are you saying that  
20       Engelhard did not have the requisite legal intent?

21                  **MR. BRESS:** Your Honor, absolutely. Our  
22       argument is that Engelhard did not have wrongful  
23       intent. But our argument is also that BASF did not  
24       have wrongful intent.

25                  And you have -- on the privilege log and

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1       the 66 documents, there are documents from 2008,  
2       2009, years after the acquisition.

3                     This is why we think they haven't made  
4       the prima facie case, because what evidence have they  
5       put before your Honor that would suggest any basis  
6       that BASF intended to commit a crime or fraud after  
7       BASF acquired Engelhard? That is I think a  
8       fundamental issue.

9                     And it happens on the front end too,  
10      your Honor. Why in the 1970s -- what evidence has  
11      been brought before your Honor that would show that  
12      lawyers, legal services were misused?

13                    Let's assume the marketing statements  
14      were false. We disagree. Even if they were false,  
15      that alone does not trigger the crime fraud  
16      exception, because what the crime fraud exception is  
17      about is not fraud writ large, but the misuse of  
18      legal services in furtherance of that fraud where the  
19      client intends that result.

20                   And merely putting up a couple of  
21      marketing statements from the 70s and claiming  
22      they're false without anything more does not get the  
23      plaintiffs where they need to be. That's the problem  
24      with this motion.

25                   I think the same is true with documents

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1 during the Westfall case. The allegation that  
2 they've put forward is that the Westfall case was  
3 designed when Engelhard was litigating the cases with  
4 Cahill appropriately that the documents were  
5 produced, that witnesses testified truthfully about  
6 the documents.

7                   **SPECIAL MASTER:** But what am I to do  
8 with the allegation that, as you just said, in the  
9 Westfall case, Engelhard and Cahill were doing what  
10 they were supposed to do. They made disclosures, and  
11 then they went: Whoops, we got to put an end to this  
12 piece of litigation. And part of that has to be that  
13 all of this information that we have disclosed needs  
14 to get put in a very dark and cold corner, never to  
15 be seen again. And in the future, going forward,  
16 when the same issue came up, nobody said: Oh, here's  
17 the information that was developed in Westfall.

18                   That's not what was said. What was said  
19 was there's no proof of asbestos in any of the talc,  
20 when in fact the information in Westfall proved  
21 something different. That's their claim.

22                   **MR. BRESS:** Right.

23                   **SPECIAL MASTER:** And how do you get  
24 around that?

25                   **MR. BRESS:** But, your Honor, the problem

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1 is that's their claim. There's no proof that would  
2 support that claim. What they're --

3 **SPECIAL MASTER:** Whoa, whoa. Slow down.  
4 Okay. The proof is I read at least the Hemstock and  
5 Gale depositions. They're not crystal clear. And  
6 they're clearly not as clear as Mr. Placitella would  
7 like it to be.

8 But there's enough there where they can  
9 say: As of the Westfall case, people were on notice  
10 that at least some people thought that the Emtal talc  
11 contained asbestos. In what quantities I don't know.  
12 In what concentrations I don't know. But there were  
13 some people, and not John Does off the street, but  
14 people who had a reason to know who thought that that  
15 was the case.

16 The Westfall case gets settled with an  
17 agreement of confidentiality and a return of all  
18 information. That goes off, gets put over here.

19 And then in the future what's being said  
20 is: No, there is no such evidence, when in fact it  
21 is sitting in the Westfall documents, wherever they  
22 may have landed. Okay.

23 You then get to the second Rhode Island  
24 case. I forgot what the plaintiff's name was.

25 **MR. PLACITELLA:** Martin.

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1                           **SPECIAL MASTER:** Martin. And that  
2 plaintiff retains an expert who goes out and does an  
3 investigation, comes back with a report that  
4 basically says there's asbestos in them there hills.

5 And that case gets settled again with  
6 another agreement that we get everything that you  
7 have, including your expert's report. And that gets  
8 put on the shelf somewhere.

9                   In the meanwhile, all of these other  
10 cases are developing and they're all being told,  
11 because I read any number of letters to that effect,  
12 there is no proof of our talc containing any  
13 asbestos. Therefore, you should dismiss the case.  
14 Some of them went as far as to threaten the  
15 imposition of sanctions.

16                   Those two sets of facts have a hard time  
17 coexisting, unless there's something that connects  
18 the two.

19 Plaintiff suggests that what connects  
20 the two was the scheme and artifice to defraud that  
21 was developed by the defendants in order to shelve  
22 all of the information that showed wrongdoing and  
23 make assertions that were false so that they could  
24 get a litigation advantage. That's their assertion.

25 In order for them to pierce the

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1 attorney/client privilege, they have to show, at  
2 least for my purposes, a prima facie case by a  
3 preponderance of the evidence in fact there is a good  
4 faith basis to believe that that was the case.

5 Now, whether they've done so or not  
6 we'll all find out in due course.

7 But at least for today's purposes, how  
8 do you respond to that? You can't just say: Well,  
9 they haven't done it. Mr. Placitella spent two  
10 hours of my life marshaling his facts. He didn't  
11 pull them out of thin air. He had a document for  
12 each and every thing that he said.

13 Now, whether I agree with his  
14 interpretation of those documents is a different  
15 story altogether. But there certainly was some  
16 showing today.

17 **MR. BRESS:** Your Honor, the point we are  
18 making is that at best the showing is one of fraud.  
19 It is not a showing that would allow a prima facie  
20 case to be found for the crime fraud exception.

21 And the reason is because the crime  
22 fraud exception has more elements than just simply  
23 fraud.

24 If you want to take away somebody's  
25 privilege, there have to be various other

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1 requirements that are met.

2 There are many cases that go to trial  
3 and someone successfully proves fraud. It doesn't  
4 mean at the end of the day there's a jackpot where  
5 you then get your route through the privileged  
6 documents. They're two very different inquiries.

7 And the central problem we have with the  
8 plaintiffs' submission is that they haven't brought  
9 forward evidence of a wrongful client intent.

10 There are ways in which they -- it's not  
11 up to me how they decide to build their case. But I  
12 don't think it can be built based on supposition or  
13 based on speculation.

14 **SPECIAL MASTER:** Well, I don't think  
15 that that is fair or at least a fair evaluation of  
16 what I'm being told, because the way I view it, the  
17 way I view plaintiffs' arguments is they say: Look,  
18 there was this scheme and artifice to defraud. It  
19 was cooked up by BASF and Cahill. Just what they're  
20 claiming. I'm not saying any of this is true. And  
21 in furtherance of this, this is what they did. So  
22 therefore, the communications between them during  
23 that period of time must be vitiated because of what  
24 they were doing. It's kind of logical.

25 And the problem is I don't know what

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1 those communications are because I haven't seen them.  
2 You have, I hope. But I haven't seen them. And so  
3 I don't know if the e-mail from a partner at Cahill  
4 to a paralegal at Cahill was: Can you get me the  
5 Westfall depositions, as opposed to: I read the  
6 Westfall depositions and I think we need to put this  
7 in a very dark, dark corner to: By the way, I was  
8 thinking about the Westfall depositions, but how  
9 about them Yankees?

10 I don't know what it says.

11 **MR. BRESS:** Your Honor, I think that we  
12 probably are going to circles, but --

13 **SPECIAL MASTER:** We are going in  
14 circles.

15 **MR. BRESS:** And I don't want to belabor  
16 these points. I think you have our view of the crime  
17 fraud exception. And I do want to -- before we run  
18 out of time, I do want to let Mr. Farrell walk  
19 through some of these slides, because I think that's  
20 an important thing for your Honor to see.

21 **SPECIAL MASTER:** I'm here for however  
22 long you need. But Mr. Placitella --

23 **MR. PLACITELLA:** I changed.

24 **SPECIAL MASTER:** You okay?

25 **MR. PLACITELLA:** Yeah.

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1                           **SPECIAL MASTER:** It's taken care of?

2                           **MR. PLACITELLA:** Yes, your Honor. Thank  
3 you.

4                           **SPECIAL MASTER:** All right. Well, I  
5 will say to you again, I thought that was more  
6 important than what we're doing here.

7                           Mr. Farrell, you are now their last  
8 great hope.

9                           **MR. FARRELL:** Thank you for setting  
10 appropriate expectations, your Honor.

11                          **SPECIAL MASTER:** Don't feel any pressure  
12 now.

13                          **MR. FARRELL:** The issue that I wanted to  
14 speak to you were all the slides that you saw this  
15 morning from Mr. Placitella concerning the supposed  
16 fraud.

17                          You heard Mr. Bress speaking to were  
18 there lawyers involved in the fraud and the absence  
19 of a connection between the alleged fraud and legal  
20 advice and legal advice in furtherance of fraud.

21                          The issue I wanted to come back to is  
22 whether there's been any fraud actually proven.

23                          And I think what you saw this morning  
24 actually underscores the problems that we've been  
25 trying to identify for some time in plaintiffs'

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1 theory of this case, because I really do think it's a  
2 theory.

3 Your Honor will remember our very first  
4 introduction on October 26th, 2017. I think that --

5 **SPECIAL MASTER:** I've tried very hard to  
6 forget it. But that's okay.

7 **MR. FARRELL:** I think that issue number  
8 1 on the agenda that day was science day. We had  
9 filed a motion months earlier asking for a science  
10 day. And that motion was still caught up in papers.  
11 It hadn't been fully resolved. And I believe Mr.  
12 Assaf was explaining to you why we thought that  
13 science day was so important.

14 And what your Honor saw this morning  
15 illustrates again why the science day is important  
16 and how it relates to all of the issues that you've  
17 been hearing about this morning, not just the testing  
18 records in the 1970s, but frankly why there was a  
19 reasonable basis in the minds of lawyers and others  
20 in the 80s and the 90s and the 2000s for statements  
21 that were made.

22 Your Honor has been identifying the  
23 point: Well, can't I make the reasonable inference  
24 from the documents that Mr. Placitella showed me this  
25 morning that there was fraud and that there was a

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1      crime of fraud?

2                    And I would submit to your Honor there  
3      is no reasonable inference to be made along those  
4      lines because the very documents he showed you  
5      undercut the point he's trying to make.

6                    He would show you paragraph 1, and then  
7      when you look at paragraph 2, it actually contradicts  
8      the point that's made. We tried to settle --

9                    **SPECIAL MASTER:** Sort of the like the  
10     purge memo.

11                  **MR. FARRELL:** Well, I don't know that I  
12     would say it's kind of like the purge memo, because I  
13     think your Honor correctly described it. It was  
14     actually a retention memo.

15                  I wanted to just hit on a few points  
16     here because I know it's late in the day.

17                  The first is we've been trying to  
18     underscore the necessity of actual evidentiary proof  
19     of the allegations that have been thrown around.

20                  Your Honor probably noticed in  
21     plaintiffs' submission no expert declaration, no  
22     expert report, nobody speaking to what do these  
23     actual tests mean, what are their capabilities, what  
24     are their limitations and so on.

25                  **SPECIAL MASTER:** Well, but in your

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1 response, in your opposition you took them to task  
2 over that, didn't you?

3 **MR. FARRELL:** And that was the point I  
4 wanted to highlight is that BASF --

5 **SPECIAL MASTER:** You don't need to  
6 highlight it. I read it. I know what it is.

7 **MR. FARRELL:** We have in fact put  
8 forward competent expert testimony explaining what  
9 the tests mean.

10 And I think that's a key point, because  
11 a proper understanding of the testing record is why  
12 there was a basis for all of the statements that were  
13 made.

14 Now, there were a couple slides that Mr.  
15 Placitella showed you this morning that I wanted to  
16 just walk through briefly because I think it  
17 illustrates what I'm trying to say.

18 Mr. Placitella, will you put up your  
19 slide 33, please?

20 **MR. PLACITELLA:** I have to put the  
21 pieces back together here.

22 **MR. FARRELL:** In the interest of time,  
23 your Honor, I'll keep going.

24 **SPECIAL MASTER:** This is going to be  
25 forever. He's having trouble plugging one thing into

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1 the next.

2 **MR. FARRELL:** I believe it's plaintiffs'  
3 Exhibit 9 that I wanted to refer to --

4 **SPECIAL MASTER:** Okay.

5 **MR. FARRELL:** -- which is the technical  
6 data sheet that Mr. Placitella showed you.

7 **SPECIAL MASTER:** You mean the technical  
8 data sheet that was supposedly part of the material  
9 safety data sheet?

10 **MR. FARRELL:** And actually was not, yes,  
11 that's the one, your Honor.

12 **SPECIAL MASTER:** Okay. The one that  
13 you came over here to look at?

14 **MR. FARRELL:** That's correct.

15 **SPECIAL MASTER:** Which one?

16 **MR. FARRELL:** C.

17 **SPECIAL MASTER:** Tab C?

18 **MR. FARRELL:** We have here -- this is  
19 the slide I was -- where I noticed it. So you see  
20 that Mr. Placitella has highlighted the second  
21 paragraph in the document.

22 **SPECIAL MASTER:** What does it say on the  
23 bottom lefthand corner of that?

24 **MR. JARED PLACITELLA:** October 1978.

25 **SPECIAL MASTER:** Okay. So I'm using the

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1 right technical data sheet. Okay. I just want to  
2 make sure. That would be Exhibit 9, Tab C.

3 Can you tell me, Mr. Farrell, or anybody  
4 else here, whether the material safety data sheet  
5 that precedes the technical data sheet, what the date  
6 of it was? Because the date is blank.

7 **MR. FARRELL:** I don't believe the two  
8 documents are connected. And that's part of the  
9 issue.

10 **SPECIAL MASTER:** That will be my next  
11 question, because when I look at the Bates numbers,  
12 they don't seem to be sequential. But I want to  
13 start with dates. So can you help me on that?

14 **MR. PLACITELLA:** I think the proof will  
15 show that every time they issued the data sheet they  
16 didn't put a new date on it.

17 **MR. FARRELL:** There's actually multiple  
18 data sheets with different dates on them. The point  
19 that I wanted to make --

20 **SPECIAL MASTER:** Well, the one that I'm  
21 looking at, which is immediately preceding that  
22 technical data page, has no date on it whatsoever.  
23 So I don't know if this material safety data sheet  
24 was ever used, was ever sent to anybody.

25 **MR. FARRELL:** That's exactly correct,

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1 your Honor. And that I think is part of the point  
2 that Mr. Bress was alluding to and that I also wanted  
3 to highlight, which is the lack of evidence actually  
4 proving up that documents were used in the way that  
5 the plaintiffs claim they were used.

6 I also think that this technical data  
7 sheet illustrates the problems we have here with the  
8 supposed reasonable inferences that can be drawn from  
9 documents.

10 You see that Mr. Placitella has  
11 highlighted on his slide 33 the second paragraph of  
12 the technical data sheet, which is a paragraph that  
13 contains the language regarding no trace of any  
14 asbestos minerals.

15 And Mr. Placitella told you that this is  
16 a false statement and fraud because at the time  
17 Engelhard had evidence that there was asbestos in the  
18 talc.

19 What he didn't tell you is that the very  
20 next paragraph in the document, the third paragraph,  
21 goes on to discuss the fact that the company did have  
22 false positives, that there were some tests that  
23 reported asbestos shaped fibers, but when you  
24 actually looked at them with more powerful equipment,  
25 it was determined that it wasn't asbestos.

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1                   And this wasn't a statement that was  
2 made up out of whole cloth. It was actually based on  
3 testing data that Mr. Placitella has and that BASF  
4 has today. It is in a testing document that appears  
5 in plaintiffs' Tab Number -- Exhibit 3, Tab Number 2.

6                   And I have a loose copy here if it would  
7 speed things along or I'd be happy to show your Honor  
8 where it is in the binder.

9                   **SPECIAL MASTER:** Nothing in my life gets  
10 speeded along in this case. I think I have it right  
11 here. What's the Bates number?

12                  **MR. FARRELL:** The Bates number is BASF  
13 Samson and then a bunch of zeros 13076.

14                  **SPECIAL MASTER:** Okay. That's the  
15 second page. Now, again help me out. Going back to  
16 that technical data sheet that's up on the screen  
17 when you pointed out the third paragraph of it, when  
18 I read that, it tells me that randomly you might look  
19 at something at relatively low magnification and it  
20 may have something appearing to be asbestosiform.

21                  **MR. FARRELL:** Correct.

22                  **SPECIAL MASTER:** And I asked the  
23 question of Mr. Placitella, because as far as I  
24 understand, asbestosiform is not a supplement for  
25 asbestos, it is a --

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1                   **MR. FARRELL:** It's a shape.

2                   **SPECIAL MASTER:** It's a term of art  
3 defining the shame of something --

4                   **MR. FARRELL:** Your Honor is --

5                   **SPECIAL MASTER:** -- that makes it look  
6 like but is not necessarily asbestos.

7                   **MR. FARRELL:** You're a hundred percent  
8 correct. The pen that I'm holding --

9                   **SPECIAL MASTER:** It happens  
10 occasionally.

11                  **MR. FARRELL:** The pen that I'm holding  
12 right now is asbestiform.

13                  **SPECIAL MASTER:** Because it's a straight  
14 line.

15                  **MR. FARRELL:** Because it looks like a  
16 fiber. And that's exactly what was going on in the  
17 tests. And the tests that I just referred your Honor  
18 to, Tab 2 of Plaintiffs' 3, in the third full  
19 paragraph, which begins: At about 450 times  
20 magnification, Engelhard scientists recount the fact  
21 that using low power microscopes you occasionally see  
22 asbestiform particles that look like fibers. But  
23 when you use a better microscope, it turns out it's  
24 just talc that's rolled up, talc on its side, so on  
25 and so forth.

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1                   That was all reported in the technical  
2        data sheet that Mr. Placitella told you was the basis  
3        for client fraud beginning in 1972.

4                   They had testing data that supported the  
5        conclusion and then they reported that conclusion in  
6        the technical data sheet.

7                   This all relates to a certain type of  
8        microscope called phase contrast microscopy, which is  
9        discussed in our expert reports and in those  
10      documents.

11                  And that brings me to the next slide of  
12      Mr. Placitella's that I wanted to show you, which is  
13      number 40.

14                  Mr. Placitella.

15                  **MR. PLACITELLA:** Hold on one second.

16                  **MR. FARRELL:** While he's pulling it up,  
17      I'll note, your Honor, this distinction, the issue of  
18      unreliable tests and better tests that actually show  
19      you reliable results, the limitations of PCM and so  
20      on and so forth, essentially form the basis for all  
21      of the company's marketing statements in the 1970s  
22      and have a significant role in the statements that  
23      were made in litigation later.

24                  So the document that I'm showing to you,  
25      this document from 1972, the test, to us is a key

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1 document. This is showing what the company believed.  
2 We have some test that are unreliable. Better  
3 testing shows different results. And throughout the  
4 early part of the 1970s, the better results, as  
5 recounted in our expert report, showed no asbestos.

6 I wanted to pull up this document,  
7 number 40, because it illustrates the point.

8 Mr. Placitella showed you 1972 testing  
9 and then 1977 testing.

10 What he didn't say is that both of these  
11 tests used the phase contrast microscope that the  
12 company believed was unreliable for determining the  
13 presence of asbestos. And not just Engelhard, the  
14 United States government thinks it's unreliable.

15 **SPECIAL MASTER:** These days that's not a  
16 good thing.

17 **MR. FARRELL:** Every reputable asbestos  
18 expert in the United States thinks it's unreliable  
19 for differentiating asbestos from talc.

20 I think that's probably why you don't  
21 see an expert declaration from the plaintiffs on this  
22 issue.

23 The next slide I wanted to talk about is  
24 number 45. Mr. Placitella.

25 **MR. PLACITELLA:** Hold on one second.

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1                   **MR. FARRELL:** So this is slide 45, which  
2 quotes again a portion of a May 22nd, 1979, testing  
3 document.

4                   And this was the portion of the  
5 plaintiffs' presentation where they started talking  
6 to you about the findings of abundant fibers. And  
7 they were trying to draw the distinction between  
8 abundant and trace. And the suggestion was that  
9 abundant was some monumental amount of asbestos and  
10 therefore any argument by BASF that there was only  
11 trace amounts of asbestos in the talc is false.

12                  If you turn to the second page of the  
13 document that the plaintiffs put up here, which they  
14 didn't put in their slide --

15                  **SPECIAL MASTER:** And where do I find  
16 that? Because they have it as Exhibit 4E. And we've  
17 already ascertained that it's not 4, it's 3, right?

18                  **MR. FARRELL:** It's Tab 29 of plaintiffs'  
19 Exhibit 3.

20                  **SPECIAL MASTER:** Tab 29. And You want  
21 me to look at the second page?

22                  **MR. FARRELL:** It's the very first  
23 sentence of the second page. After discussing the  
24 test results that Mr. Placitella put up on the screen  
25 and tried to suggest that abundant meant some

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1 monumental amount of asbestos, this same May 22nd,  
2 1979, document says, quote: It can be seen that most  
3 of the samples have less than .01 percent fibers.  
4 With the exception of 79J-4, an Emtal 42 product  
5 processed 2/13/79, this particular sample had about  
6 0.3 percent fibers.

7 So the point here being --

8 **SPECIAL MASTER:** What's the magic  
9 number? At which point does this become bad for you?

10 **MR. FARRELL:** Well, I'll submit to the  
11 Court it's much higher than 0.3 percent. And I think  
12 we also --

13 **SPECIAL MASTER:** I know you're  
14 submitting that. But what's the basis for your  
15 submission?

16 **MR. FARRELL:** The basis for my  
17 submission is the expert reports that we included  
18 with our materials where they discuss the fact -- and  
19 I believe it's paragraph 49 of the expert report from  
20 Drew Van Orden that we submitted wherein he discusses  
21 the fact that words like abundant, many, trace, the  
22 sorts of things that you see in those documents and  
23 that the plaintiffs rely on, are just arbitrary terms  
24 that don't actually tell you anything about the  
25 amount of asbestos that's in a product.

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1                           **SPECIAL MASTER:** Like highly unlikely  
2 meaning impossible.

3                           **MR. FARRELL:** Exactly, your Honor.

4                           Slide 47, Mr. Placitella.

5                           I'm sorry, your Honor. I'm told it's  
6 paragraph 48 of the Drew Van Orden report.

7                           **SPECIAL MASTER:** Okay.

8                           **MR. FARRELL:** The reason I wanted to  
9 call your Honor's attention to this particular slide  
10 is because Mr. Placitella showed it up. This is a  
11 few moments after he told you that the company knew  
12 as of the early 1970s that there was asbestos in the  
13 talc.

14                          And the language that caught my eye on  
15 this document from 1979 is that the plaintiffs  
16 themselves called out the sentence that characterizes  
17 this as a, quote, newly recognized risk.

18                          How could it be a newly recognized risk  
19 if it dated back to 1972 years later?

20                          The whole point was that in 1979 there  
21 were new test results that reported new things, not  
22 things that dated back to 1972.

23                          **SPECIAL MASTER:** Well, except that if  
24 the 1979 test reported a presence of asbestos, didn't  
25 you have to disclose that?

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1                           **MR. FARRELL:** In what context, your  
2 Honor? Because I think --

3                           **SPECIAL MASTER:** In the context of the  
4 client saying: I don't want anything that has  
5 asbestos in it. In the context of someone who sues  
6 Engelhard saying: I used your product and I've  
7 contracted asbestosis or mesothelioma or some form of  
8 asbestos related cancer.

9                           And instead, what plaintiffs say is that  
10 in each one of those instances your response was:  
11 Emtal talc does not contain asbestos, period.

12                           **MR. FARRELL:** And there was a basis for  
13 that statement. And the basis for the statement is  
14 that even contemporaneous with the 1979 tests  
15 reporting trace amounts of asbestos in some samples,  
16 there were many other tests that still said no  
17 asbestos.

18                           And even testing that's been done today  
19 on actual samples of Emtal talc has found no asbestos  
20 in the talc.

21                           That's also included as part of Mr. Van  
22 Orden's and Dr. Gunther's submissions.

23                           So I think by the second half of the  
24 plaintiffs' presentation they were attempting to walk  
25 past the issue of well, how much asbestos was there.

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1                   That's the key issue. The whole basis  
2 for these statements both in the marketing materials  
3 and later in the litigation was a product of how much  
4 asbestos was there and how often was it there and  
5 what was the basis for saying those things.

6                   The fact that there were trace amounts  
7 of chrysotile asbestos in some samples of the talc in  
8 only a portion of the operation of the mine is a key  
9 fact that became the basis for statements that were  
10 made later.

11                  **SPECIAL MASTER:** But you also have  
12 deposition testimony of Dr. Hemstock who said based  
13 upon his calculations in respect of one customer  
14 alone, Congoleum, you're talking about 1.8 million  
15 pounds of asbestos fibers that were being delivered  
16 to Congoleum each year.

17                  **MR. FARRELL:** I'm glad you raised that,  
18 your Honor.

19                  **SPECIAL MASTER:** I know you are. That's  
20 why I was giving you an introduction.

21                  **MR. FARRELL:** You might have looked at  
22 my card. That was the next slide on my list.

23                  **SPECIAL MASTER:** I looked at Mr. Assaf's  
24 card.

25                  **MR. FARRELL:** Number 56, Mr. Placitella.

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1                   This is exactly the issue that your  
2 Honor observed, which is that the language quoted on  
3 Mr. Placitella's slide again uses that magic word  
4 asbestiform, not asbestos.

5                   And when you actually look at Dr.  
6 Hemstock's testimony from 2012, not from 1983, he  
7 focused on that exact distinction. He recognized the  
8 distinction between asbestiform and asbestos and was  
9 talking about the fact that yes, sometimes we found  
10 asbestiform materials, but they weren't always  
11 asbestos.

12                  So to me the math equation that the  
13 plaintiffs tried to walk him through is largely a red  
14 herring. It's telling us that based on some back of  
15 the envelope that they tried to get Dr. Hemstock to  
16 walk through, he did some math based on asbestiform  
17 materials, not on asbestos.

18                  The other point I would note is if it  
19 really were true that there were 600,000 pounds of  
20 asbestos delivered to one customer in one year, I  
21 kind of think somebody would have noticed the fact in  
22 1979 that there were essentially dump trucks full of  
23 asbestos in this talc that was being delivered.

24                  And yet what you see both from  
25 government testing, from customer testing, is them

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1 all agreeing with Engelhard that there's no asbestos  
2 in the talc.

3                   B. F. Goodrich, one of the customers  
4 that Mr. Placitella has focused on and put a few  
5 documents up on the slides, tested the talc itself in  
6 the second half of the 1970s and said: We found no  
7 asbestos in your talc.

8                   So it seems to me to be a fundamental  
9 disconnect between the claim that there's 600,000  
10 pounds of asbestos being delivered to one customer  
11 and with the same customer saying: We're doing this  
12 testing and we're not finding any asbestos. And the  
13 government doing testing and saying: We're not  
14 finding any asbestos.

15                  The explanation is first that the math  
16 is absurd. But second, we're talking about  
17 asbestos and not asbestos.

18                  **SPECIAL MASTER:** It's not math. It's  
19 arithmetic.

20                  **MR. FARRELL:** Arithmetic.

21                  **SPECIAL MASTER:** Which can still be  
22 absurd, but a different issue.

23                  **MR. FARRELL:** So the point I'm trying to  
24 make here, your Honor, is you had raised the issue of  
25 reasonable inferences from the documents. And I

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1 believe you used terms like the facts marshaled from  
2 the plaintiffs.

3                   The problem is that the documents you've  
4 seen, the facts that have been marshaled aren't even  
5 supported by the documents that have been shown to  
6 you. And they're certainly not supported by  
7 competent evidence from experts, others who could  
8 actually tell you what the documents mean.

9                   We have done that. BASF has done that  
10 and explained what the documents mean and how they  
11 actually inform the sorts of statements that the  
12 plaintiffs are claiming are false but frankly were  
13 true at the time they were made.

14                   Thank you, your Honor.

15                   **SPECIAL MASTER:** You want to come back,  
16 Mr. Assaf?

17                   **MR. ASSAF:** A little bit back on  
18 procedure, your Honor. Thank you.

19                   A couple points. On procedure, I know  
20 we're going to do the brief on the spoliation. The  
21 last 10 or so slices which Mr. Placitella  
22 acknowledged were totally new in terms of him now  
23 trying to say these are the in furtherance documents,  
24 these are the timelines, and I appreciate your  
25 anti-sandbagging sentiment, I would like the

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1 opportunity to address those either in a brief or in  
2 the argument after the spoliation brief.

3                   **SPECIAL MASTER:** You're assuming there  
4 will be argument after the spoliation brief.

5                   **MR. ASSAF:** Well, I did. Again, I'm  
6 watching you. I'm learning from you. I think  
7 you've already said that on important issues, you  
8 know, we can come and see you. And I think these are  
9 important issues. And we'd like to come back after  
10 we submit and especially address those last 10  
11 slides, which we'll now get copies of from Mr.  
12 Placitella and do that. That's number 1.

13                   **SPECIAL MASTER:** I will be guided by  
14 what you all want. But I will tell you that my  
15 original inclination was to get the brief and then  
16 spend some time deciding it, because this is one  
17 you're not going to get a decision that day. I'm  
18 going to write something, because the issue merits  
19 it.

20                   On most of the other things I can give  
21 you an explanation, do what we call in New Jersey a  
22 bench opinion, which is what I normally do, and then  
23 send you an order.

24                   This is a little different. No matter  
25 how it gets resolved, I think somebody or another is

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1 going to seek review.

2 And I owe it to Chief Judge Linares to  
3 give him something that he can look at and say either  
4 I'm completely off my medication or maybe I actually  
5 got it right.

6 **MR. ASSAF:** And I appreciate that, your  
7 Honor. For clarification, you're talking about  
8 addressing stage 1, whether there's a *prima facie*  
9 case that would then go forward?

10 **SPECIAL MASTER:** In my view, I have no  
11 choice.

12 **MR. ASSAF:** Correct.

13 **SPECIAL MASTER:** It's a tiered  
14 examination. If I don't find that there's a *prima*  
15 *facie* case, I don't get to the second step.

16 I know that plaintiffs have argued that  
17 I can look at step 2 to determine step 1. I just  
18 don't agree on that. I think there is a procedure  
19 and it makes sense to me.

20 **MR. ASSAF:** So I'll follow your Honor's  
21 guidance. But I would like to come back, because we  
22 will have a 60 page brief and we will have --

23 **SPECIAL MASTER:** No, we're going to have  
24 a brief hopefully not more than 60 pages, but  
25 substantially less, because Mr. Bress is going to

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1 make sure of that.

2                   **MR. ASSAF:** And we will have the  
3 opportunity to review the new slides, admittedly new  
4 slides. And I'd like to argue those in front of your  
5 Honor.

6                   **SPECIAL MASTER:** Okay.

7                   **MR. ASSAF:** And then in the interim,  
8 your Honor, I'm going to ask you to consider, given  
9 your very questions and Mr. Farrell's dispute with  
10 Mr. Placitella about science, whether we can now have  
11 science day, because I'll make the point to your  
12 Honor no judge, no judge, no mediator, no Special  
13 Master who's ever been involved in this case has had  
14 a science day.

15                  **SPECIAL MASTER:** Do you really think I  
16 need one --

17                  **MR. ASSAF:** I do, because --

18                  **SPECIAL MASTER:** -- in light of what  
19 you've heard today?

20                  Even Mr. Farrell thinks that I know my  
21 stuff, so...

22                  **MR. ASSAF:** I do think you know your  
23 stuff, your Honor. And I'll be honest with you, I  
24 think the reason I want one is because we're going to  
25 put points on the board in terms of confirming that

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1       most of these slides cannot be trusted in terms of  
2       the science. And there's a reason why -- if the  
3       plaintiffs felt so strongly about their case, why  
4       wouldn't they want their expert, Fitzgerald, to spend  
5       an hour and have you ask him some questions?

6                   I think that's dangerous, because you do  
7       know enough. And so I would like to have --

8                   **SPECIAL MASTER:** So you're saying I know  
9       enough to be dangerous?

10                  **MR. ASSAF:** Yeah, I actually --

11                  **SPECIAL MASTER:** I don't think that's a  
12       compliment actually.

13                  **MR. ROTH:** Your Honor, if I said that,  
14       it would be like another weekend e-mail.

15                  **SPECIAL MASTER:** That's exactly right.

16                  **MR. ASSAF:** Mr. Roth suggested I say  
17       that.

18                  **MR. ROTH:** You took my card.

19                  **MR. ASSAF:** Your Honor, that's what I'm  
20       saying. Listen, if it turns out that it's five hours  
21       and it's a waste of time, our bad.

22                  But these are such important issues, why  
23       wouldn't the plaintiffs want you to ask their expert  
24       questions about this asbestosiform issue?

25                  **SPECIAL MASTER:** I can't tell the

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1 plaintiffs how they need to present their case.  
2 They are very good lawyers. This is not their first  
3 rodeo. They know what they need to do.

4                   **MR. ASSAF:** Well, then I would ask  
5 permission that we be able to present -- and they  
6 could cross. If they don't want to bring anybody, I  
7 could have an expert come here and what I would think  
8 distill some of the key scientific points from the  
9 slides that Mr. Placitella showed and show you why  
10 it's just wrong on the science.

11                  Mr. Placitella could ask him questions.  
12 You could ask him questions. And what's the worst  
13 that could come of that? It would be like you're a  
14 litigator.

15                  **SPECIAL MASTER:** It would be another day  
16 in my life I wouldn't get back. So there's always  
17 that.

18                  Let me think about it. My inclination  
19 is no, I don't think it's necessary. I don't want  
20 people to do something that's unnecessary under the  
21 circumstances.

22                  When I look at the number of lawyers who  
23 are in this room, I can hear the meters running.  
24 This is an expensive proposition for all the parties  
25 who are involved.

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1                   And so as you well know, I tend to be  
2 very cautious about that. And we've spent a great  
3 deal of time on the motions today.

4                   So I do want to get Mr. Bress's brief,  
5 underscore the word brief. And I know he's going to  
6 be parsimonious with his words.

7                   You know why they call them briefs,  
8 right?

9                   **MR. BRESS:** I'm aware, your Honor.

10                  **SPECIAL MASTER:** Okay.

11                  **MR. ASSAF:** Just procedurally then, your  
12 Honor --

13                  **SPECIAL MASTER:** I think Mr. Placitella  
14 is going to want to speak in reply, so --

15                  **MR. ASSAF:** Oh, I'm sorry. Okay.

16                  **MR. PLACITELLA:** A couple of things.

17 One, science day, there was a motion for science day.

18                  **SPECIAL MASTER:** And it was denied  
19 without prejudice. So they can bring it again.

20                  **MR. PLACITELLA:** They can file the  
21 motion and we'll respond again.

22                  **SPECIAL MASTER:** Exactly right.

23                  **MR. PLACITELLA:** The last 10 slides,  
24 I'll send them to him. But you basically obviated  
25 those slides because you said: I'm not going to look

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1 at that stuff that you're showing me. Give me your  
2 list. That's what you get to do.

3 So why they would need a brief in  
4 response to slides that you're refusing to look at --

5 **SPECIAL MASTER:** Well, they want to --

6 **MR. PLACITELLA:** -- it's fine.

7 **SPECIAL MASTER:** They want to look at  
8 the slides. I know you're going to send them to  
9 them.

10 **MR. PLACITELLA:** Right.

11 **SPECIAL MASTER:** And they're going to  
12 make a judgment as to whether they need to address  
13 them any further.

14 And I'm sure that Mr. Assaf will come to  
15 the reasonable conclusion that he really does not  
16 have to address them any further. But that's Mr.  
17 Assaf's conclusion to reach.

18 **MR. PLACITELLA:** I have some substantive  
19 comments. It will take less than 10 minutes.

20 **SPECIAL MASTER:** Okay.

21 **MR. PLACITELLA:** Maybe less than five.

22 **SPECIAL MASTER:** Shorter the better.

23 But take as much time as you need.

24 **MR. PLACITELLA:** I understand. So the  
25 issue was raised why do we include the information --

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1                           **SPECIAL MASTER:** I'm so sorry. My  
2    apologies again. You're over there to the left.  
3    Miss Gussack, anything you want to add?

4                           **MR. GUSSACK:** No, your Honor. We join  
5    in the argument that BASF has made. And we won't  
6    burden the Court with further argument.

7                           **SPECIAL MASTER:** Pay attention. That's  
8    a good argument. Okay.

9                           **MS. GUSSACK:** It's an extremely lucid  
10   argument.

11                          **SPECIAL MASTER:** Short and sweet.  
12    I'm sorry, Mr. Placitella. Go ahead.

13                          **MR. PLACITELLA:** I'll try to be less  
14    than five minutes.

15                          **SPECIAL MASTER:** You're taking more time  
16    telling me how little time you're going to take.

17                          **MR. PLACITELLA:** Yes. The issue was  
18    why did we raise the issue about what the customers  
19    were told.

20                          The issue is because BASF points to  
21    Cahill like it was all their idea. The point here  
22    was that the intent to --

23                          **SPECIAL MASTER:** I don't think that's a  
24    fair appraisal of the evidence. I don't think BASF  
25    is --

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1                           **MR. PLACITELLA:** Well, let me rephrase  
2 it.

3                           **SPECIAL MASTER:** -- dumping this on  
4 Cahill.

5 MR. PLACITELLA: Let me rephrase it.

6 They talk about intent. It goes to intent. What  
7 they did even before litigation goes to intent.  
8 They did not want the issue of asbestos in their talc  
9 disclosed. And they did that before there was even  
10 litigation. It was ongoing.

11 So the idea or the notion there was  
12 no intent did not originate with Cahill. It  
13 originated with Engelhard. And it just kept going.

14 Cahill might have been the agent that  
15 carried out the strategy. But the notion of where it  
16 came from originated -- that's why we discussed that.

When you talk about that technical data sheet, it's interesting and way too deep on the science. But they say they used the most sophisticated methods possible and they cite x-ray defraction. They never say that they did tests with a transmission electron microscope and found asbestos. So there's issues with this to begin with.

24 But without getting --

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1 you're waving a piece of paper. I don't know what it  
2 is.

3 **MR. PLACITELLA:** The technical data  
4 sheet.

5 But when they say between 2006 and 2009  
6 nothing's happened, that BASF did not continue.

7 Well, they did continue. They continued to file  
8 summary judgment motions saying there was no asbestos  
9 in the talc and no evidence of asbestos in the talc.  
10 They continued to send letters. They continued to  
11 make representations to courts. And they continued  
12 to get dismissals.

13 **SPECIAL MASTER:** Was the cast of  
14 characters who were Engelhard in 2006 part of what  
15 had been going on before then?

16 **MR. PLACITELLA:** Some people stayed and  
17 some people did not, as I understand. For example,  
18 Mr. --

19 **SPECIAL MASTER:** You got to listen to my  
20 question.

21 **MR. PLACITELLA:** Yes.

22 **SPECIAL MASTER:** When the transfer  
23 occurred, the people who were there at Engelhard,  
24 were they part and parcel of what you allege happened  
25 before then?

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1                   **MR. PLACITELLA:** Some, yes. Yes.

2                   **SPECIAL MASTER:** Okay. And of those  
3 who were, did some of them stay on in appropriately  
4 supervisory capacities past 2006?

5                   **MR. PLACITELLA:** I'll answer it this  
6 way, because I'm not sure of the answer. For  
7 example, Mr. Dornbusch was there before and he stayed  
8 for a short time thereafter. I think part of his  
9 package was that he had to stay for a while.

10                  **SPECIAL MASTER:** To provide for an  
11 orderly transition.

12                  **MR. PLACITELLA:** So he was there before  
13 and after. There were other people who were in the  
14 legal department who were there long before and a  
15 significant time after. And so there were some --

16                  **SPECIAL MASTER:** My concern is BASF  
17 acquires Engelhard in 2006. And at that point the  
18 acquiring company, like every acquiring company in  
19 the universe, looks at the company they have acquired  
20 and the main decision that they make is if it ain't  
21 broke, don't fix it.

22                  So they're not going to go back and  
23 search 20 years' worth of records. They're going to  
24 say: Okay, what do we have that we need to confront?

25                  And if they're told: Well, you know,

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1 we've got these cases, but this is the way they've  
2 been handled all the way through, there's no scienter  
3 there.

4 And it's something that at some point or  
5 another somebody needs to acknowledge.

6 And I think the same is true as to the  
7 folks at Cahill Gordon. If at a certain point the  
8 people who were there when plaintiffs allege this  
9 whole thing was concocted, if it becomes  
10 institutionalized, at some point it's hard to say,  
11 well, you know, you're doing this with scienter, when  
12 in fact they're just doing it because that's the way  
13 it's being done.

14 **MR. PLACITELLA:** Well, their agent, Mr.  
15 Sloane, sat in the depositions in Westfall and he was  
16 still actively litigating the case well past the time  
17 that Cahill Gordon -- I mean, I'm sorry, that BASF  
18 took over Engelhard.

19 So there was continuity there. And  
20 there was clear institutional knowledge. And we can  
21 prove that pretty solidly, frankly.

22 **SPECIAL MASTER:** Okay.

23 **MR. PLACITELLA:** It is unclear, and  
24 we're in the process of taking depositions, what  
25 everybody's role was, even if they were there before

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1 and after. They were there before and after, we know  
2 that. What their exact role was is unclear until we  
3 take those depositions.

4                   **SPECIAL MASTER:** If they had nothing to  
5 do with this litigation --

6                   **MR. PLACITELLA:** Exactly.

7                   **SPECIAL MASTER:** -- or similar  
8 litigation.

9                   **MR. PLACITELLA:** Right. So it's unclear  
10 to me at this point. Keep in mind we filed this --  
11 we were asked to file this motion without  
12 depositions. So I can't answer every question.

13                  I may know information that if I didn't  
14 want to trample a violate a Supreme Court order,  
15 which I'm not going to do, I could answer many of  
16 your questions. But I can't do that. And it's hard  
17 to tell the left side of your brain, you know, not to  
18 intrude on the right. But a lot of the things I've  
19 been asked point-blank I can't answer. I would love  
20 to answer them, but I can't answer them.

21                  **SPECIAL MASTER:** Well, this is not the  
22 first time in your career you've had that problem.

23                  **MR. PLACITELLA:** That's exactly right.  
24 Of Mr. Farrell threw up a couple of isolated test  
25 results.

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1                           **SPECIAL MASTER:** Mr. Farrell does that.

2                           **MR. PLACITELLA:** Right. They verified  
3 asbestos in this talc using transmission electronic  
4 microscopes, SEM, PLM, XRD. And by the way, PLM is  
5 what OSHA sanctioned. It's not that great. But it's  
6 what OSHA sanctioned. So by every scientific --

7                           **SPECIAL MASTER:** I have no clue what any  
8 of those acronyms stand for.

9                           **MR. PLACITELLA:** But my point is by  
10 every scientific analysis that was available by  
11 multiple parties, that is multiple scientists, they  
12 found asbestos. They just didn't take some  
13 unreliable -- and it almost begs the question. All  
14 right.

15                          And here's where I end my presentation.  
16 It almost begs the question, because the inquiry  
17 isn't what information -- the inquiry here is you  
18 said that -- and you told courts and litigants that  
19 there was no evidence of asbestos, no evidence of  
20 asbestos, no evidence exists.

21                          Mr. Carter signed an affidavit saying  
22 there was no testing data. That was false.

23                          Those people, respectfully, had a right  
24 to hire their own experts to evaluate that.

25                          And you say well, how much is enough?

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1     If you look at the Robertson case, okay, the  
2     Robertson case is a significant case. The Robertson  
3     case was a case that went to the Third Circuit Court  
4     of Appeals. It was a case that was handled by Mr.  
5     Rothenberg after Engelhard got out of the case. The  
6     trial judge dismissed the case because he said there  
7     just wasn't enough asbestos in that talc and the  
8     proofs weren't that great, the product ID wasn't that  
9     great.

10                   And it went to the Third Circuit. And  
11                   the Third Circuit said: Well, even with this little  
12                   bit of asbestos -- and frankly, it was a lot less  
13                   than these tests show -- even with this little bit of  
14                   asbestos, these plaintiffs have the right to go  
15                   forward and litigate their case.

16                   What happened here was these plaintiffs  
17                   lost that right. They lost the right to hire their  
18                   own experts with the right data.

19                   So it does not matter. We don't need  
20                   science day. This is about -- they said there was  
21                   no evidence. They didn't say there was no reliable  
22                   evidence. They said there was no evidence. They  
23                   said there was no testing data.

24                   **SPECIAL MASTER:** Well, but if you have  
25                   someone who performs a test and the test that he or

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1       she performs is one that is not in accordance with  
2       generally accepted professional standards, isn't it  
3       the right of someone else to say that test was not  
4       performed in accordance with generally accepted  
5       professional standards, so I'm going to disregard it  
6       because it's not evidence of anything, it wasn't  
7       properly done.   And I --

8                   **MR. PLACITELLA:**   But they didn't -- I'm  
9       sorry.

10                  **SPECIAL MASTER:**   And I think that that's  
11       what lies at the root of Mr. Assaf's request for a  
12       science day.   It's not to educate me about the  
13       science, which I can assure everybody here would be  
14       an entirely futile endeavor, but to put in the record  
15       what the basis of those determinations was so that  
16       people can say, hey, understand, there were these  
17       reports, but if you look at it, you know, they were  
18       testing for apples and they found oranges.   It's not  
19       a good report, so it's not evidence of anything.

20                  So therefore, when we say there is no  
21       evidence, and they also add and we conducted our own  
22       reports and they don't come to the same conclusion,  
23       that maybe there's no scienter in what was being  
24       done.

25                  And in order to prove a crime or fraud,

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1 you do have to prove a guilty mind.

2                   **MR. PLACITELLA:** Yes, your Honor. But  
3 there was a lot more than that, because they never  
4 gave anybody the opportunity.

5                   They said there was no testing data.

6 There was nothing for anybody to look at and  
7 evaluate. They had three of their own scientists  
8 testify under oath that they found asbestos in the  
9 talc. Their own scientists. Right. That was  
10 buried. Right. That was entirely buried. They  
11 said there was no -- and when they were asked under  
12 oath: Did anybody ever testify before on these  
13 issues? No.

14                   Well, that's not true. They gave  
15 nobody the opportunity to pursue their case.

16                   This is not about whether they would  
17 have won their case or lost their case. This is  
18 about whether the opportunity was taken from them.

19                   And by them stating that there was no  
20 evidence of asbestos in the talc, withholding all the  
21 test results so that the plaintiffs' own experts  
22 could look at them and make their own judgment to go  
23 forward, and by them actually having sworn testimony  
24 from their own scientists, which they buried, and  
25 they knew it, that's fraud.

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1                   That's enough, I submit, that we have  
2 made out our *prima facie* case. We're only making a  
3 *prima facie* case. We're not trying our case here.

4                   **SPECIAL MASTER:** No, you're not.

5                   **MR. PLACITELLA:** We're not trying our  
6 case here. But here we have clear evidence. They  
7 can determine -- they can argue what it means. But  
8 there is clear data. There's clear evidence. You  
9 have sworn testimony. And they made the judgment  
10 that they were going to withhold it.

11                  That's not permitted under any court  
12 rule in any place. It impacts the integrity of what  
13 we do as a profession, that no one would -- no one in  
14 this room -- I know almost every lawyer in this room.  
15 No one in this room would do that. No one.

16                  And what they did was wrong. It was in  
17 violation of their responsibilities.

18                  These people were -- they lost their  
19 rights to move forward. They lost their right to  
20 make their own informed decision. They could have  
21 taken all that data and given it to an expert and the  
22 expert says: You know what, on balance this is not  
23 worth it.

24                  They didn't give them that right because  
25 they knew it was important enough and it was

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1 significant enough that they got rid of it.

2 If it was so insignificant, then why  
3 didn't they just turn it over? If the testimony of  
4 Dr. Hemstock, Mr. Gale, and Dr. Triglia was so  
5 insignificant, then why didn't they just turn it  
6 over?

7 Because what happened here, when Mr.  
8 Ashton signed his affidavit and said there's no  
9 evidence of asbestos in that mine --

10 **MR. ASSAF:** That's not what he said.

11 **MR. PLACITELLA:** -- they knew that they  
12 had their own scientists that came to a different  
13 conclusion.

14 So at the end of the day -- and I'm  
15 going stop here -- courts and litigants were all told  
16 the same thing. People's cases were compromised. It  
17 was not just in letters. It was in sworn statements.  
18 It was in briefs that many judges probably spent  
19 weekends reading. And as a result --

20 **SPECIAL MASTER:** I know the feeling.

21 **MR. PLACITELLA:** Yes. And as a result,  
22 these people lost their rights.

23 And that, your Honor, is a prima facie  
24 case of fraud under the standard that we're talking  
25 about today.

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1                   And all that does is say to you, okay,  
2 let's go to the next step. Let's actually see  
3 what's there. Maybe Placitella and Roth, they're  
4 all wet. Maybe we'll look at these documents and --

5                   **SPECIAL MASTER:** Well, there's no maybe  
6 about that.

7                   **MR. PLACITELLA:** -- and there's -- maybe  
8 we'll look at those documents and there nothing.

9                   But supposing the documents, despite  
10 whatever Mr. Farrell said, the parties are discussing  
11 the fact that, hey, there's asbestos in this talc,  
12 what are we going to do about it, right.

13                  Suppose there are admissions in the  
14 documents that say --

15                  **SPECIAL MASTER:** So one of the documents  
16 is the proverbial smoking gun, right?

17                  **MR. PLACITELLA:** I don't know what's in  
18 the documents. Okay. I'm not allowed to say what I  
19 know.

20                  But all I'm saying to you is we're at a  
21 point where we've made our prima facie case. There  
22 are less than 75 documents probably, even counting  
23 whatever's in the compilation, for you to look at.

24 You spend more time --

25                  **SPECIAL MASTER:** And your son, Mr. Jared

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1 Placitella, is going to get me a list of that by  
2 Wednesday.

3 **MR. JARED PLACITELLA:** Thank you, your  
4 Honor.

5 **SPECIAL MASTER:** Wednesday at five p.m.  
6 Eastern time.

7 **MR. PLACITELLA:** You will spend more  
8 time reading the 120 pages of briefs on whether  
9 documents were destroyed or not, which -- and, you  
10 know, I'll never get the opportunity to respond to  
11 that. And I understand why.

12 But if their proof ultimately  
13 demonstrates to you that all the documents are there,  
14 that only proves our case. It proves that they had  
15 the information and they withheld it.

16 So it's six of -- it's one way or the  
17 other. They had the information in their  
18 possession, including -- we know Mr. Dornbusch had it  
19 because he had the compilation. But they told  
20 everybody it didn't exist.

21 So whatever they submit actually proves  
22 our case. If they submit evidence that doesn't show  
23 that they have all the documents, that proves that  
24 stuff is missing. If they give you evidence that  
25 shows you --

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1                           **SPECIAL MASTER:** Proof that stuff is  
2 missing is not necessarily proof of spoliation.

3                           **MR. PLACITELLA:** Well, except for the  
4 fact that Judge Linares has ruled that as of 1983  
5 they had an obligation to retain the evidence.

6                           If the conclusion is that the evidence  
7 does no longer exist, then they have violated that  
8 obligation. That is different.

9                           So when you're talking about a prima  
10 facie case of crime fraud, you're really talking  
11 about two different issues. You can find crime fraud  
12 under either one. You can find crime fraud solely  
13 based upon the misrepresentations that were made and  
14 that the people acted.

15                          You can also find crime fraud if you  
16 find there was a -- as part of the intent to keep the  
17 information away from people, that they actually went  
18 through efforts to destroy documents.

19                          And even if they didn't destroy  
20 documents, it's clear that they secreted them away.

21                          Either way -- either way -- well, if  
22 they had -- I look at your face. If they had the  
23 purge memo and they collected it all, that meant they  
24 had it.

25                          So when they told people they didn't,

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1 that was not true. That proves our *prima facie* case.

2                   What I'm saying to you is I could have  
3 come here with two separate motions on crime fraud,  
4 one on miss representation and prevailed and one on  
5 spoliation. And we think we will prevail.

6                   When I say spoliation, that's a bad term  
7 because it's got a lot of technicals. When I say  
8 spoliation, I mean destruction of evidence. Okay.  
9 I could have come to you with the issue of --

10                  **SPECIAL MASTER:** More appropriately,  
11 failure to preserve evidence.

12                  **MR. PLACITELLA:** Failure to preserve  
13 evidence. And if I came to you on that basis alone  
14 and I was able to show that they had an intent to get  
15 rid of the evidence and the evidence doesn't exist,  
16 that would be enough to satisfy my *prima facie* case.

17                  Or I could have never came to you with  
18 the spoliation -- with the destruction of evidence  
19 and just come to you with the misrepresentations  
20 based upon what they say they have and based upon  
21 what's in that compilation.

22                  **SPECIAL MASTER:** That is why I gave you  
23 the option --

24                  **MR. PLACITELLA:** Right.

25                  **SPECIAL MASTER:** -- of either

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1 withdrawing your spoliation claim or getting a  
2 sur-reply brief.

3 **MR. PLACITELLA:** I understand that. But  
4 I think both are --

5 **SPECIAL MASTER:** You want them both in  
6 play?

7 **MR. PLACITELLA:** Right.

8 **SPECIAL MASTER:** You want them both in  
9 play. And I understand that. And because of the  
10 importance of this application, I'm doing something  
11 that runs against the grain for me, which is to  
12 condone the filing of something that I think should  
13 never have been filed, not based upon what I was told  
14 was the burden of proof of the filing.

15 And that's troublesome to me. I will  
16 get past it. But I have to tell you it is  
17 troublesome to me. And I want everybody to hear  
18 that, because please don't do that.

19 You ask me: Can I get additional pages?  
20 You want 35, fine. You want to do appendices, okay.

21 But there's a reason and a purpose for  
22 appendices. And it's not to throw a 44 page brief  
23 over the transom and call it an appendix. That's not  
24 the way to do it.

25 **MR. PLACITELLA:** I take responsibility

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1 for that.

2                   **SPECIAL MASTER:** I was blaming you  
3 anyway, so it's okay.

4                   **MR. PLACITELLA:** I take responsibility  
5 for that. I understand what you're saying. We'll  
6 have a further conversation about some of these  
7 issues.

8                   All I'm saying is I'm not going to get  
9 an opportunity. And I understand why. But whatever  
10 they submit I believe proves our point, because if  
11 they prove that they had the evidence, then it should  
12 have been disclosed.

13                  So I believe as we sit here today, we  
14 have made out our prima facie case and that we should  
15 move to the next step. And we'll look forward to the  
16 Court's ruling.

17                  Thank you for your time.

18                  **SPECIAL MASTER:** Thank you.

19                  **MR. ROTH:** Your Honor, are you going  
20 to --

21                  **SPECIAL MASTER:** Can you bear with me  
22 for one second? I'm trying to find something --

23                  **MR. ROTH:** Of course.

24                  **SPECIAL MASTER:** -- that I know I  
25 misplaced. There's far too much paper here.

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1 I'm sorry, Mr. Roth. Thank you.

2 **MR. ROTH:** Thank you, your Honor. Two  
3 things. First of all, that weekend brief for you,  
4 that wasn't my fault, was it?

5 **SPECIAL MASTER:** I'm sorry?

6 **MR. ROTH:** The weekend brief reading,  
7 that wasn't my fault, was it?

8 **SPECIAL MASTER:** Well, I'm happy to  
9 blame you.

10 **MR. ROTH:** Okay. That's what I thought.

11 I just wanted to touch quickly on --  
12 circle back to the standards. We've had a lot of  
13 discussion about in furtherance of.

14 And what I wanted to do is commend your  
15 Honor to the briefing that we've done to show why the  
16 standard in New Jersey is different from the federal  
17 court cases that you've heard about today and have  
18 read in the briefs.

19 **SPECIAL MASTER:** I get that.

20 **MR. ROTH:** Yes. And a part of that  
21 argument, your Honor, is we think we've established a  
22 *prima facie* case in accordance with New Jersey law  
23 from those public documents.

24 **SPECIAL MASTER:** I get that also.

25 **MR. ROTH:** And that the notion that we

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1 would have to be able to show you what privileged  
2 documents prove that to meet our *prima facie* case is  
3 sort of the Major-Major issue that you identified.

4                   And so although there is some discussion  
5 about, you know, are we agreeing it's in furtherance  
6 of, well, everything's a question of how you  
7 define -- I was actually looking at the dictionary to  
8 see whether or not in furtherance is the same. I  
9 think it's a, you know, difference without -- we  
10 don't have to spend much time on.

11                  **SPECIAL MASTER:** It's a distinction  
12 without difference.

13                  **MR. ROTH:** Well, there is a little bit  
14 of a difference the way that New Jersey law applies  
15 it. And that's why I was trying not to go down that  
16 road.

17                  **SPECIAL MASTER:** As I said, it's not my  
18 native language. So I'm going to do my best to  
19 figure it out.

20                  **MR. ROTH:** Today it feels like it's not  
21 mine either, Judge.

22                  I would point out that we don't need  
23 those privileged documents to prove the *prima facie*  
24 case, nor could we. It would really be --

25                  **SPECIAL MASTER:** Well, that's not what

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1 your partner argued. Your partner argued that I can  
2 use the privileged documents to --

3 **MR. ROTH:** Yes -- I'm sorry. Go ahead,  
4 your Honor.

5 **SPECIAL MASTER:** He argued that I could  
6 use the privileged documents to determine whether in  
7 fact a prima facie case has been met.

8 **MR. ROTH:** True. But it is not a  
9 requirement that you use the privileged documents to  
10 determine that a prima facie case has been met.

11 **SPECIAL MASTER:** I actually think the  
12 opposite, that I am not allowed to look at the  
13 privileged documents in order to determine whether a  
14 prima facie case exists. That's putting the cart  
15 before the horse in my view.

16 **MR. ROTH:** I think we're in agreement on  
17 that, your Honor.

18 **SPECIAL MASTER:** That's because you're a  
19 very wise man. Okay.

20 I'm sorry, Mr. Pratter?

21 **MR. PRATTER:** I just -- at the risk of  
22 opening my mouth when I shouldn't --

23 **SPECIAL MASTER:** That's every lawyer's  
24 risk, so --

25 **MR. PRATTER:** I'm going to risk it.

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1                           **SPECIAL MASTER:** I figured there was no  
2 stopping you.

3                           **MR. PRATTER:** I'm going to risk it. I  
4 think what we're trying to say is in order to get to  
5 step 2, you have to have the documents in front of  
6 you. We don't have the documents to give you.

7                           So when you said it's a Major-Major,  
8 it's Catch-22, their argument is we have to present  
9 the privileged documents and identify them with  
10 precision in order for you to go on to the next step.

11                          That's absolutely an impossible  
12 standard. It can't be done. Its a circular  
13 argument.

14                          So I think your Honor is right that we  
15 make a prima facie case based upon the applicable  
16 standard with public documents in order to allow your  
17 Honor -- forget about whether it's -- whether we've  
18 proven crime fraud or not. The question is to allow  
19 your Honor to go to the next step of looking at the  
20 documents.

21                          And whether you say it's in order to  
22 determine whether a prima facie case was made or  
23 whether crime fraud has occurred almost doesn't  
24 matter. The question is the process. And I  
25 think -- well, I'm not citing any cases because I'm

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1 not sure what --

2                   **SPECIAL MASTER:** I get it.

3                   **MR. PRATTER:** I'm saying this is so much  
4 to me a forest and the trees argument and --

5                   **SPECIAL MASTER:** It's not easy.

6                   **MR. PRATTER:** And you can't say I've got  
7 to have all the trees in front of me in order to  
8 determine there's a forest out there and what kind of  
9 trees they are. Is it a beech tree, an elm tree, an  
10 oak tree, a maple tree?

11                  **SPECIAL MASTER:** As I tell my  
12 children --

13                  **MR. PRATTER:** We're saying there's a  
14 forest.

15                  **SPECIAL MASTER:** As I tell my children,  
16 if it were easy, any idiot could do it. Because it's  
17 hard, it requires a special kind of idiot.

18                  **MR. PRATTER:** Well, I'm a special kind  
19 of idiot.

20                  **SPECIAL MASTER:** Well, welcome to my  
21 club.

22                  **MR. PRATTER:** But my point is, you know,  
23 I just sit here and almost marvel at some of these  
24 arguments, which just seem to me angels dancing on  
25 the head of a pin.

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1                           **SPECIAL MASTER:** Well, there's a little  
2 bit of that.

3                           Now, if I don't let Mr. Assaf talk  
4 again, he's going to go home and kick his dog, so --

5                           **MR. ASSAF:** Two dogs.

6                           **SPECIAL MASTER:** Two dogs.

7                           **MR. ASSAF:** I wasn't going to, but the  
8 10 minutes turned into 35, so I would like to make  
9 three points, your Honor.

10                          First to Mr. Pratter's point, I  
11 fundamentally disagree and --

12                          **SPECIAL MASTER:** I'm shocked that you  
13 would disagree.

14                          **MR. ASSAF:** I'll tell you why, your  
15 Honor, because of case law. Case after case, when  
16 you review what courts have done on crime fraud  
17 rulings, especially within the Third Circuit, is that  
18 they've actually had evidentiary support.

19                          And your colloquy with Mr. Placitella  
20 regarding, well, is there a cross-over, who was there  
21 when, and then he talked about Mr. Carter.

22                          What normal litigants do in these cases,  
23 and I've handled them before, is that they come to  
24 court having taken Mr. Carter's deposition, having  
25 taken depositions saying: Your Honor, let me now

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1 show you who is where, what they're doing, without  
2 even knowing the privileged information. That's  
3 what litigants do.

4 And if you review those cases within the  
5 Third Circuit, that's why we've having so much  
6 trouble here, because they're not offering you  
7 evidentiary support such as who was there and what  
8 does Mr. Carter say.

9 Mr. Carter's being deposed in two weeks.  
10 And we're talking about Mr. Carter. And Mr.  
11 Placitella hasn't even deposed him.

12 Point number 2, Ashton. I have to  
13 correct this. I know it's in the briefs, your Honor,  
14 but he continues to say Ashton said there's no  
15 evidence of asbestos.

16 **SPECIAL MASTER:** I read Mr. Ashton's  
17 affidavit.

18 **MR. ASSAF:** He said based on the studies  
19 above --

20 **SPECIAL MASTER:** I read Mr. Ashton's  
21 affidavit.

22 **MR. ASSAF:** But as lawyers we just -- we  
23 have to have some ground rules that if you're going  
24 to quote an affidavit, it has to be -- for the  
25 declarant's purposes it has to be correct.

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1                           **SPECIAL MASTER:** But as advocates we got  
2 to give a little bit of rhetorical leeway to the  
3 lawyer who is arguing.

4                           I don't think that anybody in this room  
5 is intentionally misstating something. Just we all  
6 have different perspectives.

7                           And it's my job to sort of blow away the  
8 smoke and try to get to the core question. And I  
9 think I've -- I hope that I've demonstrated to  
10 everyone in this room that I do have the ability to  
11 do that and I do, do that.

12                          So I don't know why you're so terribly  
13 exercised about point number 2. But that's all  
14 right. You have one more.

15                          **MR. ASSAF:** My final point is there  
16 is -- as seen here in this last 15 minutes, there is  
17 an analytical divide between how we say crime fraud  
18 should be approached versus Mr. Placitella's what I  
19 think was a jury argument on fraud that could be  
20 given virtually in any case that would then open up  
21 any litigant to a crime fraud proceeding. And I  
22 think that's a huge difference.

23                          And again, when we now get --

24                          **SPECIAL MASTER:** Have I given you any  
25 reason to believe that I'm going to be persuaded by

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1 the functional equivalent of a jury argument?

2 **MR. ASSAF:** I'm going to go home and hug  
3 my dogs on that note.

4 **SPECIAL MASTER:** I think you should do  
5 better and hug them.

6 Okay. Anything else on the crime fraud  
7 motion?

8 **MR. ASSAF:** That's it.

9 **SPECIAL MASTER:** Okay. Well, as we  
10 stand now, there will be a sur-reply -- I'm sorry,  
11 there will be a new list -- don't go crazy on me -- a  
12 new list of Appendix C to be submitted to me by five  
13 p.m. on Wednesday, what is that, the 28th of  
14 February.

15 Consistent with how you did it before,  
16 please send it to me. Do not file it with a copy to  
17 Mr. Assaf and a copy to Miss Gussack?

18 Did I pronounce that correctly?

19 **MR. GUSSACK:** Yes, sir. Thank you.

20 **SPECIAL MASTER:** Thank you. Okay.  
21 And then a sur-reply on the issue of spoliation not  
22 to exceed 60 pages each from BASF and Cahill due by  
23 five p.m. on March 21st.

24 Okay. At that time I want you to tell  
25 me whether you want additional argument in respect of

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1 that.

2                   If you do, I'm just telling you it is  
3 going to be scheduled on fairly short notice, because  
4 I do want to get this decided as promptly as  
5 possible, largely because I've been told that it  
6 might be an impediment to discovery that is ongoing.  
7 And that needs to get done. That has a May deadline  
8 on it.

9                   So I know with all the lawyers who are  
10 here, you're all going to be able to get all the  
11 discovery that you need done by the discovery  
12 deadline. So I'm quite confident in that.

13                  But other than that, there's not much  
14 more I can tell you about the crime fraud motion at  
15 this stage.

16                  Which then takes me to --

17                  **MR. ASSAF:** On crime fraud, your Honor,  
18 I also think we're going to get the slides on Monday.

19                  **SPECIAL MASTER:** Oh, yes.

20                  **MR. PLACITELLA:** Is Tuesday all right?

21                  **SPECIAL MASTER:** Tuesday is fine.

22                  **MR. PLACITELLA:** Okay. Thank you.

23                  **MR. ASSAF:** And then we'll also let the  
24 Court know whether we want to either respond to the  
25 slides in writing or whether it's going to be

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1 encompassed in a request for oral argument.

2                   **SPECIAL MASTER:** You're not going to  
3 respond to them in writing.

4                   **MR. ASSAF:** It will be argument. Okay.

5 Fair enough.

6                   **SPECIAL MASTER:** If you think it is  
7 really necessary, then we can talk about argument.

8                   **MR. ASSAF:** Okay. I'll defer to Miss  
9 Gussack on that.

10                  **SPECIAL MASTER:** That's wise.

11                  Okay. And now to Mr. Assaf's  
12 housekeeping letter of February 22nd.

13                  Does everyone know what I'm talking  
14 about?

15                  **MR. ROTH:** Mr. Assaf and Mr. Pratter and  
16 I had a conversation about checklist items. We've  
17 discussed this list before the letter was sent to  
18 your Honor.

19                  We're not here with a substantive  
20 argument, but putting the cat on the roof, so to  
21 speak, about issues that we're going to anticipate  
22 down the road.

23                  **SPECIAL MASTER:** Well, what do you need  
24 me to today?

25                  **MR. ASSAF:** I think the only thing, your

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1 Honor, we'll need you to do is we will be -- not an  
2 order. I know Mr. Roth is working. We really need  
3 dates and just some judicial encouragement on dates  
4 for depositions I think.

5                   **SPECIAL MASTER:** You are hereby  
6 judicially encouraged.

7                   **MR. ROTH:** Got it, Judge. I was  
8 encouraged by Mr. Assaf before that. But I  
9 appreciate all the encouragement I can get.

10                  **SPECIAL MASTER:** But it's so much better  
11 when it comes from me, right? There you go.

12                  **MR. ASSAF:** And so yeah, I think you  
13 have some Bevan -- I hate to put more work on you. I  
14 think you have some Bevan e-mails and documents that  
15 we're --

16                  **SPECIAL MASTER:** I haven't received them  
17 yet.

18                  **MR. ROTH:** You have not, your Honor.  
19 You're going to have them -- on Monday I'm told -- on  
20 Monday you're going to have them, your Honor.

21                  **SPECIAL MASTER:** How much is that?

22                  **MR. JARED PLACITELLA:** I'd have to  
23 check, your Honor. I'm not sure offhand.

24                  **SPECIAL MASTER:** A guess? Is it as much  
25 as the last batch you sent to me?

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1                           **MR. JARED PLACITELLA:** No, there's not  
2 nearly as much.

3                           **SPECIAL MASTER:** Because I asked Mr. --  
4 you sent it and I asked Mr. Reiley: Well, can you  
5 please print that out?

6                           And I don't know if you're aware, but it  
7 was a stack that was the size of what's in this  
8 binder. And as you've seen since then, I went  
9 through each and every page.

10                          **MR. JARED PLACITELLA:** Yes, your Honor.  
11 Definitely not that much.

12                          **SPECIAL MASTER:** I'll hold you to that.

13                          **MR. JARED PLACITELLA:** Yes, your Honor.

14                          **SPECIAL MASTER:** Okay. Anything else we  
15 need to discuss today?

16                          **MR. ASSAF:** I think that's it, your  
17 Honor.

18                          **SPECIAL MASTER:** Okay. Miss Gussack?

19                          **MS. GUSSACK:** Nothing, your Honor.

20                          **SPECIAL MASTER:** Well, thank you all  
21 very much. I appreciate all of the arguments.  
22 Always lively.

23                          (The conference adjourned at 5:45 p.m.)

24

25

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1

CERTIFICATE OF OFFICER

2

3

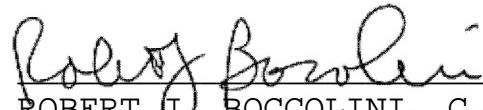
4           I, ROBERT J. BOCCOLINI, a Certified Court  
5 Reporter, do hereby certify that the foregoing is a  
6 true and accurate transcript of the stenographic  
7 notes taken by me at the time, place and on the date  
8 hereinbefore set forth.

9           I do further certify that I am neither a  
10 relative nor employee nor attorney nor counsel of any  
11 of the parties to this action, and that I am neither  
12 a relative nor employee of such attorney or counsel  
13 and that I am not financially interested in this  
14 action.

15

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ROBERT J. BOCCOLINI, C.C.R.  
Certificate No. XI01040  
Date: February 26, 2018



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